Supreme Court, U.S.
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No. 99-1976

In The

Supreme Court of the United States

GARY E. GIBSON and THE
ATTORNEY GENERAL OF THE STATE OF OKLAHOMA,

Petitioners,

v.

KENNETH HOGAN,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

1. Whether *Beck v. Alabama*, 447 U.S. 625 (1980) is applicable to a statutory scheme in which a jury or finder of guilt is not faced with the "all or nothing" decision of death or acquittal, but knows, from the voir dire process, that upon conviction they will receive sentencing options of life, life without parole and death; thus, making the decision of guilt not dependent on any consideration of whether the defendant deserves the penalty of death.

2. Whether the federal habeas court erred in failing to give any deference to the state courts' legal or factual findings when, assuming applicability of *Beck v. Alabama*, through the application of established state law a proper finding was made that the evidence did not support an instruction on the lesser offense.

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PETITION FOR WRIT OF CERTIORARI

Gary E. Gibson and the Attorney General for the State of Oklahoma respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit ("Court of Appeals") is reported at 197 F.3d 1297 and is reprinted at pages 1 to 30 of the accompanying appendix to this petition ("Pet. App."). The Order of January 3, 2000, denying the Petition for Rehearing and Suggestion for Rehearing En Banc has not been reported. It is reprinted at page 151 of the appendix. The Order of January 11, 2000, correcting the order of January 3, 2000, has not been reported. It is reprinted at pages 149 to 150 of the appendix.

The District Court's Order entered April 24, 1998, has not been reported. It is reprinted at pages 31 to 118 of the appendix. The District Court's Order denying Respondent's Motion to Alter or Amend Judgment has not been reported. It is reprinted at pages 119 to 123 of the appendix. Additionally, the Opinion of the Oklahoma Court of Criminal Appeals is reported at 877 P.2d 1157 and is reprinted at pages 124 to 148 of the appendix.

STATEMENT OF JURISDICTION

The Judgment and Opinion of the Court of Appeals was entered on December 8, 1999. Pet. App. at 1 to 30. The Order denying Petition for Rehearing and Suggestion for Rehearing En Banc was denied on January 3, 2000. Pet. App. at 151. An Order granting an extension of time to file this petition was granted by this Court on March 6, 2000, establishing a date of June 9, 2000 on which the petition was to be filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. XIV(1):

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES

Okla. Stat. tit. 21, § 701.7(A) (Supp.1982):

A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

Okla. Stat. tit. 21, § 701.9(A) (Supp.1987):

A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death, by imprisonment for life without parole or by imprisonment for life.

Okla. Stat. tit. 21, § 701.10(A) (Supp.1987):

Upon conviction or adjudication of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death, life imprisonment without parole or life imprisonment. The proceedings shall be conducted by the trial judge before the same trial jury as soon as practicable without presentence investigation.

Okla. Stat. tit. 21, § 711(2) (1981):

Homicide is manslaughter in the first degree in the following cases:

2. When perpetrated without a design to effect death, and in a heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon; unless it is committed under

such circumstances as constitute excusable or justifiable homicide.

STATEMENT OF THE CASE

This case presents this Court with an opportunity to provide necessary guidance to many lower courts which must address the issue of whether a trial court violated the Constitution in failing to instruct a jury with a lesser included offense when the penalty of death is not a mandatory punishment, but just a possible punishment, together with life imprisonment and life imprisonment without the possibility of parole. A determination of whether *Beck v. Alabama*, 447 U.S. 625 (1980) is applicable to the statutory scheme of the State of Oklahoma and others similarly situated, wherein the jury is not confronted with an "all-or-nothing" choice between capital murder and innocence, as was the jury in *Beck*, is required to resolve the issue of whether such an issue is cognizable on federal habeas corpus review or whether it is an issue of pure state law.

In addition, assuming applicability of *Beck*, this Court is being asked to determine whether the Court of Appeals was wrong in finding the Oklahoma Court of Criminal Appeals made no findings of fact entitled to the presumption of correctness provided for under the Anti-Terrorism Effective Death Penalty Act ("AEDPA"). 28 U.S.C. § 2254(e)(1). The ultimate decision of the Oklahoma Court of Criminal Appeals was not contrary to nor an unreasonable application of *Beck* as the state court, in its analysis of state law, clearly found the evidence insufficient to

support the giving of an instruction on the lesser included offense of manslaughter.

The jurisdiction of the District Court was based on 28 U.S.C. § 2241.

A. Proceedings in the State Courts.

On January 28, 1988, the Respondent, Kenneth Hogan murdered Lisa Renee Stanley in her home. Respondent chased Mrs. Stanley through her apartment and stabbed her at least twenty-two times. Respondent also slashed Mrs. Stanley's voice box and larynx.

Respondent was tried in the District Court of Oklahoma County, in Case No. CRF-88-646. During trial, Respondent requested an instruction on the lesser offense of manslaughter in the first degree. After lengthy dialogue between the parties, the trial court found that based on the evidence an instruction on manslaughter was not warranted (Tr. 1026-1073). The jury was instructed only on the crime of murder in the first degree.

Respondent was convicted of murder in the first degree in violation of Okla. Stat. tit. 21, § 701.7 (Supp. 1982). The jury found the existence of the aggravating circumstance that the murder was especially heinous, atrocious or cruel. Respondent was sentenced to death.

Respondent appealed his conviction and sentence to the Oklahoma Court of Criminal Appeals. In such direct appeal, Respondent raised numerous claims. One claim raised by Respondent was that the trial court erred in failing to instruct the jury on the lesser crime of manslaughter in the first degree. The Oklahoma Court of

Criminal Appeals found this proposition of error to be without any merit. *Hogan v. State*, 877 P.2d 1157, 1160-61 (Okla.Crim.App.1994). Pet. App. at 128 to 129.

Pursuant to Oklahoma law, to support a finding of heat of passion manslaughter, the evidence must reveal the accused had no design to effect the death of the victim and adequate provocation. *See Washington v. State*, 989 P.2d 960, 968-69 (Okla.Crim.App.1999); *Lewis v. State*, 970 P.2d 1158, 1166 (Okla.Crim.App.1998). Adequate provocation has been defined by the Oklahoma Court of Criminal Appeals as:

> . . . any improper conduct of the deceased toward the defendant which naturally or reasonably would have the effect of arousing a sudden heat of passion within a reasonable person in the position of the defendant. Generally, actions which are calculated to provoke an emotional response and ordinarily cause serious violence are recognized as adequate provocation. Actions that do not ordinarily provoke serious violence do not constitute adequate provocation. In determining whether the deceased's conduct was adequate provocation, the conduct is judged as a person of reasonable intelligence and disposition would respond to it. Mere words alone, or threats, menaces, or gestures alone, however offensive or insulting, do not constitute adequate provocation. However, words, threats, menaces, or gestures, when considered in connection with provoking conduct of the deceased, may constitute adequate provocation. Personal violence or aggression by the deceased of a nature sufficiently violent to cause or threaten to cause pain, bloodshed, or bodily

> harm to the defendant may be adequate provocation.

Washington, 989 P.2d at 968 fn. 4.

Citing to the evidence presented, together with the statements of Respondent, the Oklahoma Court of Criminal Appeals specifically found that "[t]he facts make it clear that a heat of passion theory is not justified." *Id.* at 1160. Pet. App. at 128. The Court noted that the evidence revealed "a clear design to effect the victim's death in a cold and calculated manner." *Id.* Pet. App. at 128. The Court explained:

> This Court has held heat of passion alone does not reduce a homicide to manslaughter without adequate provocation. We have held the fatal blow or blows must be the unpremeditated result of the passion aroused. (Citation omitted). The statement of the defendant plus the facts show that the blows did not come because of any overt acts on the part of the deceased, but came because the defendant believed the reporting of attempted rape, together with his pending burglary charge, would result in his imprisonment. The trial court only has the duty to instruct on lesser degrees when required by the evidence. (Citations omitted).

Id. at 1160. Pet. App. at 128 to 129. The Court noted that the evidence was sufficient to support a finding of premeditation but not a finding that the defendant had no design to effect death. *Id.* at 1160-61. Pet. App. at 129.

On rehearing, Respondent reasserted the claim citing to this Court's opinions of *Schad v. Arizona*, 501 U.S. 624 (1991) and *Beck v. Alabama*, 447 U.S. 625 (1980), to support

his position that error occurred. The Oklahoma Court of Criminal Appeals, in denying the claim, noted that this Court had "clearly held that the lesser included offense was not required when the evidence did not justify such instruction." *Id.* at 1167. Pet. App. at 147.

The Oklahoma Court of Criminal Appeals continued, however, concluding that because the jury was instructed on self-defense, the jury was given a "third option" to consider. Thus, the Court held that the requirements of *Beck* and *Schad* were met. *Id.*

B. Proceedings in the District Court.

On June 30, 1997, Respondent filed a Petition for Writ of Habeas Corpus with the District Court. Again, Respondent claimed that the trial court erred in failing to instruct the jury on the lesser crime of manslaughter in the first degree. The District Court held that under Oklahoma law, the trial court did not err in failing to instruct the jury on manslaughter. Specifically, the District Court held the evidence did not support a finding that Respondent acted without a design to effect death. Pet. App. at 47 to 50.

The District Court explained:

> The evidence introduced at trial established that Petitioner and the victim had a fight, presumably supplying the "heat of passion" element required for manslaughter instructions under Oklahoma law. However, there is no evidence that the fight rendered Hogan so angry he was unable to form the intent to kill. There is also no evidence of the causal connection

> between the alleged provocation and the homicide. Hogan does not contend Lisa Stanley's threatening to accuse him of rape resulted in anger or fear so intense that he killed her. He argues he killed her because she came at him with a knife and because he believed she was going to hurt or kill him.
>
> Additionally, the only evidence that Hogan did not intend to kill Lisa Stanley, that he did not act with a "design to effect death" were his self-serving statements, offered to the police as part of his confession. Such statements are insufficient to support manslaughter instructions. (Citation omitted). The manner of killing, twenty-two stab wounds, including four potentially fatal wounds, and her nearly-severed larynx, combined with evidence that Lisa Stanley was chased through the apartment, undercut Petitioner's argument that he was entitled to manslaughter instructions.

Pet. App. at 48.

On May 8, 1998, the Respondent filed a motion to alter or amend the judgment. On June 15, 1998, such motion was denied. Pet. App. at 119 to 123. The District Court expressed in such Order its agreement with the Oklahoma Court of Criminal Appeals that *Beck* is inapplicable to Oklahoma's sentencing scheme. Pet. App. at 122 fn. 1.

C. Proceedings in the Court of Appeals.

Respondent timely appealed from the District Court's Order denying his petition for writ of habeas corpus. The Court of Appeals reversed the decision of the

District Court. *Hogan v. Gibson*, 197 F.3d 1297 (10th Cir. 1999). Pet. App. at 1 to 30.

The Court of Appeals initially concluded that *Beck v. Alabama*, 447 U.S. 625 (1980), was applicable to Oklahoma's sentencing scheme. The Court of Appeals then discussed the holdings of the Oklahoma Court of Criminal Appeals. The Court concluded the Court of Criminal Appeals' application of *Beck* was erroneous, as self-defense does not provide a "third option" for the jury. The Court also determined that the Court of Criminal Appeals' conclusion that the manslaughter instruction was not warranted, was based on an erroneous inquiry of whether the evidence was sufficient to support first degree murder, rather than a review of whether sufficient evidence was presented to warrant an instruction on a lesser offense. Accordingly, the Court of Appeals gave no deference to any findings of the Oklahoma Court of Criminal Appeals, specifically stating:

> . . . because the Oklahoma Court of Criminal Appeals made no findings as to whether Hogan had presented sufficient evidence to warrant a first-degree manslaughter instruction, it is axiomatic that there are no findings to which we can give deference. As such, we will consider Hogan's *Beck* claim on the merits. (Citation omitted). Since the state court did not decide the claim on its merits, and instead the federal district court decided the claim in the first instance, we review the district court's conclusions of law de novo and factual findings, if any, for clear error.

Hogan, 197 F.3d at 1306. Pet. App. at 16.

Although the Oklahoma Court of Criminal Appeals set forth in its opinion the contents of the statement given by Respondent to the police, the Court of Appeals faulted the state court for failing to discuss certain excerpts of such statement. Relying, almost exclusively, on the statement of Respondent, the Court of Appeals found the evidence was sufficient to warrant a manslaughter instruction; thus, finding that Respondent's constitutional rights were violated. *Id.* at 1308-12. Pet. App. at 18 to 29.

On December 23, 1999, Petitioner filed a petition for rehearing and suggestion for rehearing en banc. On January 3, 2000, the Court of Appeals issued its Order denying rehearing and suggestion for rehearing en banc. Pet. App. at 151.

On January 11, 2000, the Court of Appeals issued its order nunc pro tunc to correct a clerical error. Pet. App. at 149 to 150.

REASONS FOR GRANTING THE WRIT

The Court's review of this matter is necessary because:

A. The lower federal courts, which frequently address the issue presented, need this Court's guidance on the issue, particularly since there is a split in the circuits on the issue;

B. The Court of Appeals has decided the issue in a manner which conflicts with the decision of the Oklahoma Court of Criminal Appeals, the state court of last resort;

C. This issue is an important issue which has not been, but should be, decided by this Court. A similar issue has been expressly reserved by this Court in a prior decision; and

D. The decision of the Court of Appeals is wrong.

A.

The lower federal courts, which frequently address the issue presented, need this Court's guidance on the issue, particularly since there is a split in the circuits on this issue.

The Tenth Circuit Court of Appeals, in the opinion below, concluded that *Beck v. Alabama*, 447 U.S. 625 (1980) is applicable to Oklahoma's sentencing scheme. Due to such finding, the Court of Appeals held that federal habeas corpus review was appropriate; and, based upon the Court of Appeals' de novo review of the evidence, relief was warranted.

In sharp contrast to the conclusion reached on this issue by the Court of Appeals in this matter, the Court of Appeals had previously held that *Beck* was inapplicable to the sentencing scheme of Oklahoma, as well as the similar federal statutory scheme. *See Johnson v. Gibson*, 169 F.3d 1239 (10th Cir. 1999); *United States v. McVeigh*, 153 F.3d 1166, 1197 (10th Cir. 1998). *See also Roberts v. Ward*, No. 98-6066, 176 F.3d 489 (10th Cir. March 25, 1999) (unpublished). In *Hooks v. Ward*, 184 F.3d 1206 (10th Cir. 1999), the Court of Appeals discussed its earlier treatment of the issue in *McVeigh* and explicitly disapproved of the language. The Court of Appeals found that *Beck* was applicable to Oklahoma's statutory scheme. In

Robedeaux v. Gibson, No. 98-6021, 189 F.3d 478, 1999 WL 672305, at *4 fn. 3 (10th Cir. July 8, 1999), the Court of Appeals acknowledged the ambiguity of its own decisions concerning the applicability of *Beck* to sentencing schemes like that utilized by Oklahoma. The Court of Appeals noted that this Court had specifically declined to rule on this issue, citing to *Hopkins v. Reeves*, 524 U.S. 88, 118 S.Ct. 1895, 1902 fn. 7 (1998). Clearly, the Court of Appeals needs assistance in resolving such ambiguity.

Furthermore, in *Hooks*, the Court of Appeals recognized the split in the circuits concerning this issue. *Hooks*, 184 F.3d at 1228 fn. 14. Many circuits, like the Court of Appeals' decisions prior to *McVeigh* and *Hooks*, have applied *Beck* without specifically addressing the issue of applicability. *See Stouffer v. Reynolds*, 168 F.3d 1170-71 (10th Cir. 1999); *Walker v. Attorney General for State of Oklahoma*, 167 F.3d 1339, 1349 (10th Cir. 1999); *Duvall v. Reynolds*, 139 F.3d 768, 785-87 (10th Cir. 1998); *Hatch v. State of Oklahoma*, 58 F.3d 1447, 1453-54 (10th Cir. 1995). *See also LaGrand v. Stewart*, 133 F.3d 1253, 1262-63 (9th Cir. 1998); *Ransom v. Johnson*, 126 F.3d 716, 724-26 (5th Cir. 1998).

When addressing the applicability of *Beck* to certain sentencing schemes, however, several circuits, most commonly as an alternative holding, have expressly found *Beck* to be inapplicable. The circuit courts' failure to deny a claim based solely on inapplicability of *Beck* may perhaps be due to the unsettled nature of the question which the Petitioner is asking this Court to address at this time.

The Fifth Circuit, in *Livingston v. Johnson*, 107 F.3d 297, 312 (5th Cir. 1997), expressly stated that "when the

capital sentencing scheme does not pose the potential for unreliable sentencing like that inherent in the Alabama sentencing scheme", *Beck* does not apply. The Fifth Circuit held that *Beck* should not be extended to a sentencing scheme where the jury is not left with an all-or-nothing choice, but upon conviction, can impose a sentence of life imprisonment or death.

In *O'Rourke v. Endell*, 153 F.3d 560, 573 (8th Cir. 1998), in addressing a claim of ineffective assistance of counsel for failure to request that the jury be instructed on lesser included offenses within capital murder, the Eighth Circuit held that, although the jury was not instructed on any lesser included offenses, the jury was given a third option of life imprisonment. Although this was not a straight *Beck* claim, the Eighth Circuit discussed *Beck* and its progeny. In addressing the prejudice prong required to establish ineffective assistance of counsel,[1] the Court stated:

> If in fact the jurors felt compelled to convict O'Rourke of capital murder – the only crime charged – out of fear that acquittal because of mental disease or defect would result in a brutal crime going unpunished, they might easily have ameliorated that result by sentencing O'Rourke to life in prison instead of death. They did not do so; . . . .
>
> The jurors had a choice – life in prison instead of death – if they felt some mitigation of the charges was required by the evidence presented. But they expeditiously chose the death penalty,

---

[1] *See Strickland v. Washington*, 466 U.S. 668 (1984).

> notwithstanding the availability of a third option.

O'Rourke, 153 F.3d at 573. The Eighth Circuit held that the risk of an unwarranted conviction was not present.

In addition, the Eighth Circuit in *Blair v. Armontrout*, 916 F.2d 1310, 1326 (8th Cir. 1990), as an alternative holding, noted that the case was unlike *Beck* because the jury, after finding the appellant guilty of capital murder, had the option of sentencing him to a prison term. Clearly, the finding of the Eighth Circuit directly conflicts with the holding of the Court of Appeals in *Hooks* and in this matter. This inconsistency in the circuits must be resolved by this Court.

Furthermore, the Third Circuit has reached a similar holding to that of the Fifth and Eighth Circuits. In *Terry v. Petsock*, 974 F.2d 372, 377-80 (3d Cir. 1992), the Third Circuit found the concern of *Beck* was not implicated. Although the analysis did not concern the sentencing options for Pennsylvania's crime of first degree murder, the analysis focused on the fact that the jury was not left with the all-or-nothing choice between acquittal and death, notwithstanding failure to instruct the jury on any lesser offense for the charge of murder. In *Terry*, the appellant was not only charged with first degree murder, but also with several other noncapital offenses, including one offense, assault by a life prisoner, which carried a mandatory penalty of life imprisonment. In addition, the jury was aware that the appellant was already serving a sentence of life imprisonment for prior crimes he had committed. Thus, the Third Circuit found no error in

failing to instruct on lesser offenses for first degree murder. The Court noted that:

> Terry's jury was not forced to make an all-or-nothing choice between a guilty verdict for a capital offense and setting Terry free. On the contrary, the jury had several other options, all of which guaranteed that Terry would serve a sentence of life imprisonment. In short, this jury faced virtually the antithesis of an all-or-nothing choice.

Terry, 974 P.2d at 379. Likewise, in a sentencing scheme where the jury has more than one sentencing option, the jury is not faced with an all-or-nothing choice between a capital conviction or setting a defendant free with no punishment at all. *See Schad*, 501 U.S. at 646.

Clearly, the lower federal courts need this Court's guidance on this issue, given that there is a split in the circuit courts. This issue will continually reappear before the federal courts. This issue cannot be resolved and applied in a consistent manner without review by this Court.

B.

The Court of Appeals has decided the issue in a manner which conflicts with the decision of the Oklahoma Court of Criminal Appeals, the state court of last resort.

As discussed above, the Court of Appeals in the opinion below, concluded that *Beck v. Alabama*, 447 U.S. 625 (1980) is applicable to Oklahoma's sentencing scheme. The Oklahoma Court of Criminal Appeals has consistently held to the contrary. *See Lambert v. State*, 874

P.2d 221, 237-38 (Okla.Crim.App.1999); *Davis v. State*, 980 P.2d 1111, 1116-17 (Okla.Crim.App.1999); *Cummings v. State*, 968 P.2d 821, 834 (Okla.Crim.App.1998); *Le v. State*, 947 P.2d 535, 547 (Okla.Crim.App.1997); *Willingham v. State*, 947 P.2d 1074, 1082 (Okla.Crim.App.1997), *overruled on other grounds Shrum v. State*, 991 P.2d 1032 (Okla.Crim.App.1999); *Perry v. State*, 893 P.2d 521, 532 fn. 46 (Okla.Crim.App.1995).

In *Willingham*, the Court of Criminal Appeals explained:

> *Beck v. Alabama* can be distinguished from this case and from Oklahoma's capital sentencing procedure. First, ... , Second, the procedure attacked in *Beck* would lead jurors to believe that a sentence of death would automatically follow a finding of guilt and makes the guilt determination depend on the jury's feelings as to whether or not the defendant deserves the death penalty. *Id.* 447 U.S. at 639-40, 100 S.Ct. at 2390-91. Our procedure allows a jury to know, during voir dire, that there are three sentencing options for first degree murder: life, life without parole, and death; therefore, the guilt determination is not dependent on the jury's feeling on whether the defendant deserves death.

Willingham, 947 P.2d at 1082. The Oklahoma Court of Criminal Appeals has held that because Oklahoma law provides viable options between acquittal and death, an Oklahoma jury is not subject to the distorting effects of the type of all-or-nothing scheme under which Beck's jury operated. Further, the Oklahoma Court of Criminal Appeals has noted that an Oklahoma jury has the opportunity to express doubts about a defendant's culpability

during the sentencing phase, again, distinguishing Oklahoma's statutory scheme from the scheme in *Beck*. *See Le*, 947 P.2d at 547.

The Oklahoma Court of Criminal Appeals has found that *Beck* is inapplicable to Oklahoma's statutory scheme; whereas, the Court of Appeals has found the opposite. Such determinations distinctly conflict. The only means for resolution of this conflict is a decision by this Court. Thus, it is imperative that the writ be granted.

C.

This issue is an important issue which has not been, but should be, decided by this Court. A similar issue has been expressly reserved by this Court in a prior decision.

In *Hopkins v. Reeves*, 524 U.S. 88, 118 S.Ct. 1895, 1902 fn. 7 (1998), this Court expressly reserved deciding whether the fact that the jury was not the final sentencer, but instead the sentence was imposed by a three-judge panel who had the alternative sentences of life imprisonment or death alone, made *Beck* inapplicable. Although the issue presented to this Court today is not identical to such reserved question, it contains such similarities that would most likely render a decision to the question in this matter also applicable to such reserved issue.

The similarity in the issues is that the final sentencer has a third option between death or acquittal, that being life imprisonment. The dissimilarity, however, is that sentencing under Oklahoma's statutory scheme remains with the finder of guilt. Thus, an Oklahoma jury is able to make a decision that the defendant was guilty of a

serious crime but deserving of a lesser penalty than death. The jury in Oklahoma is not subject to the distorting effects of the "all-or-nothing" scheme in *Beck*. Reliability in the guilt determination, as well as the sentencing determination, is satisfied. *See Hopper v. Evans*, 456 U.S. 605, 611 (1982) (*Beck* was concerned with insuring the sentencing discretion in capital cases was channeled to avoid arbitrary and capricious results). In *Schad*, this Court noted that it would be irrational to think that a jury, loath to acquit completely, would choose capital murder rather than second degree murder to keep a defendant off the streets. Likewise, it would be illogical to think that a jury, believing a defendant guilty of some crime, but not willing to acquit, would then sentence that defendant to death. Logically, all that is necessary to remedy the factfinding distortion found in *Beck* is that the jury have **any** option other than acquittal or death. Because an Oklahoma jury has the power to sentence, the interests of a third option discussed in *Beck* are fulfilled.

In addition, this Court has not established a due process requirement to a lesser included instruction except in *Beck's* unique, capital situation. *See Beck*, 447 U.S. at 638 fn. 14. If *Beck* is inapplicable, the matter is not cognizable for federal habeas corpus review.

This Court has consistently held that " 'federal habeas corpus relief does not lie for errors of state law.' " *Estelle v. McGuire*, 502 U.S. 62, 67 (1991) (quoting *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990)). *See also Pulley v. Harris*, 465 U.S. 37, 41 (1984). Instead, a federal habeas court is limited to determining whether a state conviction violates the Constitution or laws or treaties of the United States. 28 U.S.C. § 2241(c)(3). In *Beck*, this Court held, under the

during the sentencing phase, again, distinguishing Oklahoma's statutory scheme from the scheme in *Beck*. *See Le*, 947 P.2d at 547.

The Oklahoma Court of Criminal Appeals has found that *Beck* is inapplicable to Oklahoma's statutory scheme; whereas, the Court of Appeals has found the opposite. Such determinations distinctly conflict. The only means for resolution of this conflict is a decision by this Court. Thus, it is imperative that the writ be granted.

C.

This issue is an important issue which has not been, but should be, decided by this Court. A similar issue has been expressly reserved by this Court in a prior decision.

In *Hopkins v. Reeves*, 524 U.S. 88, 118 S.Ct. 1895, 1902 fn. 7 (1998), this Court expressly reserved deciding whether the fact that the jury was not the final sentencer, but instead the sentence was imposed by a three-judge panel who had the alternative sentences of life imprisonment or death alone, made *Beck* inapplicable. Although the issue presented to this Court today is not identical to such reserved question, it contains such similarities that would most likely render a decision to the question in this matter also applicable to such reserved issue.

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serious crime but deserving of a lesser penalty than death. The jury in Oklahoma is not subject to the distorting effects of the "all-or-nothing" scheme in *Beck*. Reliability in the guilt determination, as well as the sentencing determination, is satisfied. *See Hopper v. Evans*, 456 U.S. 605, 611 (1982) (*Beck* was concerned with insuring the sentencing discretion in capital cases was channeled to avoid arbitrary and capricious results). In *Schad*, this Court noted that it would be irrational to think that a jury, loath to acquit completely, would choose capital murder rather than second degree murder to keep a defendant off the streets. Likewise, it would be illogical to think that a jury, believing a defendant guilty of some crime, but not willing to acquit, would then sentence that defendant to death. Logically, all that is necessary to remedy the factfinding distortion found in *Beck* is that the jury have **any** option other than acquittal or death. Because an Oklahoma jury has the power to sentence, the interests of a third option discussed in *Beck* are fulfilled.

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This Court has consistently held that " 'federal habeas corpus relief does not lie for errors of state law.' " *Estelle v. McGuire*, 502 U.S. 62, 67 (1991) (quoting *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990)). *See also Pulley v. Harris*, 465 U.S. 37, 41 (1984). Instead, a federal habeas court is limited to determining whether a state conviction violates the Constitution or laws or treaties of the United States. 28 U.S.C. § 2241(c)(3). In *Beck*, this Court held, under the

unique circumstances of the scheme in Alabama, it was a Constitutional violation to give the jury only the options of acquittal or death. In *Schad*, this Court explained:

> Our fundamental concern in *Beck* was that a jury convinced that the defendant had committed some violent crime but not convinced that he was guilty of a capital crime might nonetheless vote for a capital conviction if the only alternative was to set the defendant free with no punishment at all.
>
> * * *
>
> We repeatedly stressed the all-or-nothing nature of the decision with which the jury was presented. (Citations omitted). As we later explained in *Spaziano v. Florida*, 468 U.S. 447, 455, 104 S.Ct. 3154, 3159, 82 L.Ed.2d 340 (1984), "[t]he absence of a lesser included offense instruction increases the risk that the jury will convict . . . simply to avoid setting the defendant free . . . . The goal of the *Beck* rule, in other words, is to eliminate the distortion of the fact-finding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence.

Schad, 501 U.S. at 646-47. Thus, a Constitutional violation has been found by this Court only when a jury is left with an all-or-nothing choice between acquittal and death. If *Beck* is inapplicable to Oklahoma's statutory scheme, there is no Constitutional violation and the matter should not be heard in a federal habeas corpus action.

As this Court recognized in *Beck*, most states including Oklahoma require that a lesser included instruction be given when supported by the evidence. *Beck*, 447 U.S.

at 636. Thus, state cases can rest on state law grounds in determining whether error occurred or not. If no error is found, this should deprive a federal constitutional claim of its premise.

The applicability of *Beck*, together with the resultant jurisdiction of the federal courts, is an important issue which will continually appear before the lower federal circuit courts. It is an important issue which has not, but should be addressed by this Court. The decision is necessary for uniformity within the jurisdictions.

D.

The decision of the Court of Appeals in (1) applying *Beck* and (2) giving no deference to the factual findings of the state court was wrong.

As discussed above, this Court should decide whether the Court of Appeals was erroneous in finding *Beck* applicable to Oklahoma's statutory scheme. Likewise, assuming the federal court had jurisdiction to hear the claim, this Court should decide whether the Court of Appeals was erroneous in finding that the state courts made no findings entitled to any kind of deference under 28 U.S.C. § 2254(e)(1).

Although the Oklahoma Court of Criminal Appeals may have misapplied *Beck* to the extent the Court concluded self-defense was a third option, the ultimate decision of the Oklahoma Court of Criminal Appeals is only contrary to or an unreasonable application of *Beck* if the evidence is sufficient to support the giving of a lesser included instruction. In this matter, the trial court found that an instruction on manslaughter was not warranted

(Tr. 1072-73). On direct appeal, the Oklahoma Court of Criminal Appeals made a finding that an instruction on manslaughter was not warranted. Assuming applicability of *Beck*, the factual findings made by the state courts, based on state law, to support their ultimate conclusions are entitled to a high measure of deference. *Marshall v. Lonberger*, 459 U.S. 422, 432 (1983). Before these factual findings can be disregarded, the federal court must conclude by clear and convincing evidence that the findings are erroneous. 28 U.S.C. § 2254(e)(1). The federal court cannot ignore nor simply disagree with such findings.

Title 28 U.S.C. § 2254(e)(1) provides:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

In addition, this Court in *Williams v. Taylor*, ___ U.S. ___, 120 S.Ct. 1495 (2000), recognized the amount of deference that must be given to a state court's application of its law.

The Court of Appeals, in its decision below, acknowledging the inconsistency within the Court concerning the correct approach to the treatment of sufficiency of the evidence for a lesser included offense, found the Oklahoma Court of Criminal Appeals made no findings as to whether the Respondent had presented sufficient evidence to warrant an instruction on the lesser offense of first degree manslaughter. The Court of Appeals erroneously interpreted the decision of the Oklahoma Court

of Criminal Appeals finding that the state court utilized the standard of sufficiency of the evidence to support the greater crime of murder in the first degree in addressing the issue of whether a lesser included offense instruction should have been given. Through such erroneous interpretation, the Court of Appeals gave no deference to the state court's application of the law, nor to the factual findings of the state court. This was clearly wrong.

A review of the opinion of the Oklahoma Court of Criminal Appeals reveals that the Court properly analyzed the issue of whether the evidence was sufficient to support the giving of an instruction on first degree manslaughter. Factual findings were made to support the Oklahoma Court of Criminal Appeals' ultimate determination. Pet. App. at 128 to 129. One such factual finding was as follows:

> The statement of the defendant plus the facts show that the blows did not come because of any overt acts on the part of the deceased, but came because the defendant believed the reporting of attempted rape, together with his pending burglary charge, would result in his imprisonment.

Hogan, 877 P.2d at 1160. Pet. App. at 128. In addition, the Court of Criminal Appeals found:

> The evidence clearly shows that the death was the result of a brutal and repeated stabbing. Evidence shows that the attack began in the kitchen, went from there to the bathroom, and finally to the living room where the victim died. The defendant stated he was putting on his coat and attempting to leave the scene of this brutal killing. However, instead of leaving the scene,

> he followed the deceased into the kitchen from which point a bloody trail to the ultimate death ensued.

Hogan, 877 P.2d at 1160-61. Pet. App. at 129. Based on these findings of fact, the Court of Criminal Appeals found the evidence did not support the lesser offense of manslaughter.[2] These findings are entitled to a presumption of correctness that can be rebutted only by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1); *Bryson v. Ward*, 187 F.3d 1193, 1207 (10th Cir. 1999). *See also Thompson v. Keohane*, 516 U.S. 99, 111-12 (1995) ("What happened" issues warrant a presumption of correctnesss); *Marshall v. Lonberger*, 459 U.S. 422, 431-32 (1983).

The Court of Appeals, by conducting its own independent review of the evidence, erroneously granted the Respondent habeas corpus relief. This decision is clearly wrong. This Court should grant certiorari review to correct such error.

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[2] Adequate provocation is a required element of heat of passion manslaughter. *See Washington v. State*, 989 P.2d 960, 968 (Okla.Crim.App.1999). Mere words alone do not constitute adequate provocation. *Id.* at 968 fn. 4.

CONCLUSION

For the reasons stated above, the Petitioners, Gary E. Gibson and The Attorney General of the State of Oklahoma, respectfully request this Court grant their Petition for Writ of Certiorari.

Respectfully submitted,

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**Counsel of Record*

Kenneth HOGAN, Petitioner – Appellant,

v.

Gary E. GIBSON; The Attorney General of the State of Oklahoma, Respondents – Appellees.

No. 98-6299.

United States Court of Appeals,
Tenth Circuit.

Dec. 8, 1999.

Patrick J. Ehlers, Jr. (Janet Chesley and Vicki Ruth Adams Werneke with him on the briefs), Assistant Federal Public Defender, Oklahoma City, Oklahoma, for Petitioner – Appellant.

Jennifer B. Miller, Assistant Attorney General (W.A. Drew Edmondson, Attorney General of Oklahoma with her on the brief), Oklahoma City, Oklahoma, for Respondent – Appellee.

Before SEYMOUR, BRISCOE and LUCERO, Circuit Judges.

LUCERO, Circuit Judge.

Kenneth Hogan appeals the denial of his petition for a writ of habeas corpus, alleging seven grounds for relief arising out of his first-degree murder conviction and death sentence in the District Court of Oklahoma County, affirmed by the Oklahoma Court of Criminal Appeals. The United States District Court for the Western District

of Oklahoma granted a certificate of appealability, pursuant to 28 U.S.C. § 2253(c) and Fed. R.App. P. 22(b)(1). Exercising jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253, we reverse and remand to the district court with instructions to grant the writ on the ground that Hogan was denied his constitutional rights under *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), when the trial court refused to instruct the jury on the lesser included offense of first-degree manslaughter.

I

On January 28, 1988, Kenneth Hogan stabbed and cut Lisa Stanley more than twenty times in the throat, head, neck, chest, and back. Approximately three of these stab wounds would have been independently fatal without immediate medical attention. George Stanley, the victim's husband, found her dead body that evening in the couple's apartment and called the police. At the crime scene, investigators found evidence of a struggle but no sign of forced entry and discovered a large butcher knife and red stains that appeared to be blood in the bathroom sink. Hogan confessed to the crime six days later.

Hogan and the victim had been friends for several years. Although the exact nature of their relationship was disputed at trial, Becky Glenn, Stanley's close friend and next-door neighbor, testified that Hogan and the victim were close friends who saw each other regularly outside of her husband's presence and without his knowledge during the months leading up to the murder. Hogan's wife testified that Stanley frequently called Hogan during that same time period. Although Hogan told a police

officer during his interrogation that he had thought about having sex with Stanley, there is no evidence on the record that the two were ever intimate.

George Stanley testified at trial that approximately six days before the murder, Hogan visited the Stanleys at their apartment, during which time he boasted of taking a martial arts class in which he was learning how to use a knife to cause fatal injury and displayed a knife he had brought with him. George Stanley testified that after the visit, Lisa stated that Hogan was making her nervous.

On the morning of the murder, George and Lisa Stanley smoked marijuana together between approximately 11:00 and 11:45 A.M., before George left for work. In Hogan's February 3, 1988, confession to the police, a tape recording of which was played to the jurors, he related the following:

> After lying to his wife about going to work, Hogan visited the Stanley home on the early afternoon of January 28, at Stanley's request, to assist her with a book report she was writing. He and the victim smoked marijuana together.[1] Stanley requested that Hogan steal a stereo for her, but he declined because of burglary charges pending against him. Soon thereafter, the two began to argue. Stanley threw a coat rack down in anger and refused to let Hogan leave the house. Hogan placed his hand over her mouth

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[1] Hogan alleges that the marijuana he and Stanley smoked had been dipped in PCP, but a test conducted by the medical examiner's office of Stanley's body revealed no evidence of PCP in her bloodstream. The record contains no evidence to support Hogan's allegation.

to quiet her, and she threatened to scream and bang on the apartment walls to alert the neighbors and to tell the police that he had attempted to rape her. Stanley then ran into a bathroom and locked the door. Hogan tried to reason with her, then kicked open the bathroom door and threatened to tell her husband "about the stuff that she's been doing, that he don't know that she is doing . . . or done." (IV O.R. at 947 (Tr. of Feb. 3, 1988, Hogan Interview at 3 (at trial, Def.'s Ex. 3, distributed to jury)) ("Hogan Interview").) Stanley ran towards the front door, but Hogan kicked the door shut and threatened to tell both her husband and her mother about an abortion that she had shortly before her marriage from a sexual encounter with a former boyfriend. Hogan said Stanley then "got a wild look in her eye" and ran to the kitchen. (Hogan Interview at 3.) She returned with a knife and "pushed" the knife at him. As Hogan attempted to grab the knife from her hand, Stanley pulled the knife back and "swung" at Hogan again, cutting him. (*Id.* at 3.) Hogan seized the knife, and Stanley ran towards the kitchen, where Hogan assumed she was going to get another knife. Hogan claimed he was afraid that Stanley would falsely accuse him of rape to explain his injuries. Hogan chased Stanley and stabbed her repeatedly, ultimately killing her.

Reviewing blood evidence from the crime scene, a police expert concluded that Stanley remained in an upright position during a portion of the stabbing, and that the stabbing began in the kitchen, with the final stabs coming in the living room area. Expert testimony stated that it was not possible to determine whether blood on a fragment of the knife came from only one person. In his

confession, Hogan stated that he killed her "[w]ith the knife she cut me with and it wasn't . . . it was like I wasn't even there . . . just somebody else . . . it wasn't even me . . . It was stabbing her and I couldn't stop him." (*Id.* at 4 (ellipses in original).)

Before fleeing the scene, Hogan threw the room's contents into disarray, hoping to make it appear as though there had been a fight between Stanley and an unknown intruder. He cleaned the wounds Stanley had inflicted on his hand and the butcher knife, left the apartment, and drove to a hospital emergency room for treatment. Hospital staff who admitted him that afternoon testified that he gave conflicting stories about how he was wounded and that he did not appear to be suffering from either an emotional disturbance or from the influence of drugs. Hogan's hand wounds had bled profusely and ultimately required treatment by a surgeon. An examining physician testified that Hogan's wounds were not inconsistent with his grabbing the knife and having it pulled away.

Hogan later asked his wife to lie to the police about his whereabouts on January 28 and the source of his injuries, but she instead informed investigators that he was not home on the day of the murder, that she did not know where he had been that day, and that he had asked her to tell the police that he had been home all day. Bloodstains were found on Hogan's clothes. On February 3, 1988, the police interviewed Hogan, and during the taped interrogation he ultimately confessed in detail to the killing.

Hogan was convicted and sentenced to death, based on the jury's finding of the "especially heinous, atrocious, or cruel" aggravating circumstance. A divided Oklahoma Court of Criminal Appeals affirmed. *See Hogan v. State*, 877 P.2d 1157, 1164 (Okla.Crim.App.1994) (*"Hogan I"*), *reh'g denied*, 877 P.2d at 1167, *cert. denied*, 513 U.S. 1174, 115 S.Ct. 1154, 130 L.Ed.2d 1111 (1995). The conviction and sentence were affirmed again on post-conviction review. *See Hogan v. State*, No. PC-95-1337, at 9 (Okla.Crim.App. Dec. 19, 1996) (*"Hogan II"*). After exhausting all available remedies for post-conviction relief in Oklahoma, Hogan filed a timely petition for habeas corpus in federal district court in June 1997, raising thirteen claims concerning his trial and sentencing hearing, and alleging ineffective assistance of trial and appellate counsel. The district court denied Hogan's petition, but granted him a certificate of appealability as to all issues. *See Hogan v. Ward*, No. CIV-97-134-R (W.D. Okla. April 24, 1998) (*"Hogan III"*).

II

Because Hogan filed his habeas petition on June 30, 1997, more than a year after the April 24, 1996, effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the provisions of AEDPA dictate our standard of review for Hogan's petition. *See Rogers v. Gibson*, 173 F.3d 1278, 1282 n. 1 (10th Cir.1999). We may not grant Hogan's petition for a writ of habeas corpus

> with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).[2]

III

We confront Hogan's argument that the trial court's failure to instruct the jury on first-degree manslaughter and second-degree murder denied him his constitutional due process rights as defined by *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), and its progeny. At trial, Hogan's counsel had requested only a first-degree manslaughter instruction. Hogan's claim that the trial court committed reversible error in not giving a

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[2] Numerous circuits have attempted to elaborate on the meaning of 28 U.S.C. § 2254(d), as amended by AEDPA. *See generally Matteo v. Superintendent*, 171 F.3d 877, 885-91 (3d Cir.), *cert. denied*, ___ U.S. ___, 120 S.Ct. 73, 145 L.Ed.2d 62 (1999) (summarizing approaches of other circuits and presenting a distinct interpretation). The United States Supreme Court has granted certiorari in a case presenting for review the Fourth Circuit's interpretation of the standards. *See Williams v. Taylor*, 163 F.3d 860, 865-66 (4th Cir.1998), *cert. granted*, ___ U.S. ___, 119 S.Ct. 1355, 143 L.Ed.2d 516 (1999). For purposes of this case, however, we need not establish a precise interpretation for this Circuit in the interim because, as discussed at Part III.C, the Oklahoma Court of Criminal Appeals did not adjudicate Hogan's *Beck* claim on the merits.

second-degree murder instruction was raised for the first time on post-conviction review before the Oklahoma Court of Criminal Appeals, which found the claim to be waived. *See Hogan II*, No. PC-95-1337, at 2 n. 5.[3] We therefore begin by considering Hogan's preserved *Beck* claim challenging the trial court's failure to provide the jury with a first-degree manslaughter instruction. The Oklahoma Court of Criminal Appeals discussed the claim in response to Hogan's petition for rehearing of his direct appeal. *See Hogan I*, 877 P.2d at 1167-68.

A

Beck held that "a sentence of death [may not] constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict." 447 U.S. at 627, 100 S.Ct. 2382 (quotation omitted). The Court explained its rationale as follows: "[W]hen the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense – but leaves some doubt with respect to an element that would justify conviction of a capital offense – the failure to give the 'third option' of convicting on a lesser included

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[3] "[A] state prisoner seeking federal habeas relief may not prevail on a *Beck* claim as to a lesser included instruction that he or she failed to request at trial." *Hooks v. Ward*, 184 F.3d 1206, 1234 (10th Cir.1999). Because we reverse the district court with orders to grant the writ of habeas corpus to order a new trial, we do not address, because they may not recur, Hogan's claims of constitutionally ineffective assistance of counsel arising from counsel's failure to request a second-degree murder instruction.

offense would seem inevitably to enhance the risk of an unwarranted conviction." *Id.* at 637, 100 S.Ct. 2382. In other words, the purpose of the rule "is to eliminate the distortion of the fact-finding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence." *Spaziano v. Florida*, 468 U.S. 447, 455, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984) (citing *Beck*, 447 U.S. at 638-43, 100 S.Ct. 2382). More recently, the Court has held there is no constitutional violation under *Beck* either when a court instructs the jury on one lesser included offense supported by the evidence even if others might be warranted, *see Schad v. Arizona*, 501 U.S. 624, 647-48, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991), or when a jury is given no option other than a capital offense at the guilt phase of a trial where the state law under which the defendant was convicted has no lesser included offense, *see Hopkins v. Reeves*, 524 U.S. 88, 118 S.Ct. 1895, 1900-03, 141 L.Ed.2d 76 (1998).

Unlike *Hopkins*, 118 S.Ct. at 1900, where Nebraska courts had consistently held "that second-degree murder and manslaughter are not lesser included offenses of felony murder," *id.* (citations omitted), Oklahoma courts have treated first-degree "heat of passion" manslaughter as a lesser included offense of first-degree murder. *See, e.g., Boyd v. Ward*, 179 F.3d 904, 917 (10th Cir.1999) (stating that under Oklahoma law "first degree manslaughter . . . is a lesser included offense of first degree murder") (citing *Lewis v. State*, 970 P.2d 1158, 1165-66 (Okla.Crim.App.1998)); *Shrum v. State*, 1999 OK CR 41 (Okla.Crim.App. 1999); *Turrentine v. State*, 965 P.2d 955, 969 (Okla.Crim.App.1998); *Le v. State*, 947 P.2d 535, 546 (Okla.Crim.App.1997), *cert. denied*, ___ U.S. ___, 118 S.Ct.

2329, 141 L.Ed.2d 702 (1998); *see also Hooks v. Ward*, 184 F.3d at 1235-37 (analyzing Oklahoma courts' refusal to give first-degree manslaughter instruction under *Beck*); *Jackson v. State*, 964 P.2d 875, 899 (Okla.Crim.App.1998) (Lumpkin, J., concurring) (stating that "First Degree Manslaughter, heat of passion, could be a lesser included offense of malice murder, based on an analysis of the elements of each offense. . . . [T]he concept of heat of passion is fairly embraced and included within the element of pre-meditation").[4]

Respondent-appellee argues as a preliminary matter that *Beck* is inapplicable to Oklahoma. Unlike the procedure under review in *Beck*, in which the jury was forced to choose between death and acquittal, Oklahoma's capital trial procedure "allows a jury to know, during voir dire, that there are three sentencing options for first degree murder: life, life without parole, and death; therefore, the guilt determination is not dependent on the jury's feeling on whether the defendant deserves death." *Willingham v. State*, 947 P.2d 1074, 1082 (Okla.Crim.App. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 2329, 141 L.Ed.2d

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[4] Oklahoma at one time employed, although inconsistently, the statutory elements test for determining whether an offense is a lesser included offense of a particular crime, comparing the statutory elements of the lesser offense to those of the greater to determine whether all of them are contained therein. *See Shrum*, 1999 OK CR 41 (overruling *Willingham v. State*, 947 P.2d 1074, 1080 (Okla.Crim.App.1997) and holding, prospectively, that Oklahoma adopts the "elements approach" for determining whether a lesser included offense instruction is warranted); *see generally Hopkins*, 118 S.Ct. at 1901 n. 6 (discussing statutory elements and "cognate evidence" approaches to determining whether one offense is a lesser included offense of another).

702 (1998), *overruled on other grounds by Shrum*, 1999 WL 974019, at *3 & n. 8. After consideration of this distinction and careful review of *Beck* and its progeny, however, we determined conclusively that "a defendant in a capital case [is entitled] to a lesser included instruction when the evidence warrants it, notwithstanding the fact that the jury may retain discretion to issue a penalty less than death," and we held that the rule in *Beck* indeed applies to Oklahoma. *Hooks*, 184 F.3d at 1227. We therefore consider the merits of Hogan's *Beck* claim.

B

In its denial of rehearing on the direct appeal, the Oklahoma Court of Criminal Appeals briefly discussed the claim that Hogan was constitutionally entitled to a first-degree manslaughter instruction. *See Hogan I*, 877 P.2d at 1167. The court noted that the jury "was given a lesser included instruction as it related to self-defense and this clearly would be a 'third option' for the jury. . . . [T]he case before us [is unlike *Beck* because] the jury was instructed and given a lesser included offense option." *Id.*

The Oklahoma court assumed that a self-defense instruction constitutes a lesser included offense instruction and thus a "third option" in addition to capital murder and acquittal. This assumption is contrary to the meaning of *Beck* and its progeny. Self-defense is not a lesser included offense of a murder charge; rather, if a defendant proves a defense of "perfect" self-defense to a murder charge, "his homicide is justified, and he is guilty of no crime – not murder, not manslaughter, but no

crime." 2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 7.11(a), at 271 (1986). Under Oklahoma law, homicide committed in self-defense "[w]hen resisting any attempt to murder [the defendant], or to commit any felony upon him" or in the defendant's "lawful defense . . . when there is a reasonable ground to apprehend design to commit a felony, or do some great personal injury, and imminent danger of such design being accomplished," is deemed justifiable homicide. Okla. Stat. tit. 21, § 733; *see also Camron v. State*, 829 P.2d 47, 56 (Okla.Crim.App.1992) ("Our statutes recognize . . . the defense of justifiable homicide [which] is available to any person when the homicide is committed under one of the . . . fact situations set forth in [Okla. Stat. tit. 21,] § 733."); *cf. Schad*, 501 U.S. at 647, 111 S.Ct. 2491 (holding that the failure to give lesser included offense instruction does not render a capital verdict unreliable if the jury has been instructed on another lesser offense because the jury is not forced into an all-or-nothing choice). Justifiable homicide is equivalent to acquittal and therefore does not obviate the dilemma underlying the concerns of *Beck*. *See Beck*, 447 U.S. 642-43, 100 S.Ct. 2382.

Similarly, the state appellate court's original conclusion on direct appeal that a manslaughter instruction was not necessary because there was "sufficient evidence" to support a finding of premeditation in the trial record is squarely contrary to the holding of *Beck*. *Hogan I*, 877 P.2d at 1160. *Beck*, 447 U.S. at 627, 100 S.Ct. 2382, requires a court to consider whether there is sufficient evidence to warrant instructing the jury on a lesser included offense, not whether there is sufficient evidence to warrant conviction on the greater offense. A *Beck* claim is not the

functional equivalent of a challenge to the sufficiency of the evidence for conviction; rather, *Beck* focuses on the constitutionality of the procedures employed in the conviction of a defendant in a capital trial and is specifically concerned with the enhanced risk of an unwarranted capital conviction where the defendant's life is at stake and a reasonable jury could have convicted on a lesser included offense. *See id.* at 637, 100 S.Ct. 2382. Given these concerns, the sufficiency of the evidence of the greater offense is distinct from the *Beck* inquiry into whether the evidence might allow a jury to acquit a defendant of the greater of the offenses and convict him or her of the lesser.[5]

C

Neither the Oklahoma Court of Criminal Appeals' inquiry as to whether instructing the jury on self-defense when a lesser included offense is available and supported by the evidence, nor its finding that there was sufficient evidence to convict appellant of the greater offense, satisfies the constitutional requirements of *Beck* and its progeny. Supreme Court precedent requires that the jury in a

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[5] Moreover, even under our rule of deference to state court interpretations of state law, *see Boyd*, 179 F.3d at 917, we must note that the conclusion of the Court of Criminal Appeals is "clearly inaccurate" under established state law, which dictates that evidence of intent does not render improper instruction on manslaughter. *Le*, 947 P.2d at 546 ("The State suggests that the [first-degree manslaughter] instruction is improper wherever there is evidence of intent. This is clearly inaccurate; under that theory a heat-of-passion instruction would never be appropriate where there was evidence of malice murder.").

capital case be provided, in appropriate circumstances, with more than a choice between first-degree murder and acquittal. *See, e.g., Spaziano*, 468 U.S. at 456, 104 S.Ct. 3154 ("We reaffirm our commitment to the demands of reliability in decisions involving death and to the defendant's right to the benefit of a lesser included offense instruction that may reduce the risk of unwarranted capital convictions."). The Oklahoma Court of Criminal Appeals' rejection of Hogan's *Beck* claim on grounds either that Hogan's self-defense instruction constituted a lesser included instruction, or that the evidence was sufficient to support conviction on the greater charge, is in gross deviation from, and disregard for, the Court's rule in *Beck*.

Under *Beck*, a petitioner is required to establish not only the denial of a lesser included offense instruction, but also that he presented sufficient evidence to warrant such an instruction. *See Beck*, 447 U.S. at 637, 100 S.Ct. 2382. Thus, while the Oklahoma Court of Criminal Appeals cited a standard consistent with *Beck*, *see Hogan I*, 877 P.2d at 1160 (stating that "[t]he trial court only has the duty to instruct on lesser degrees when required by the evidence") (citing *Dunford v. State*, 702 P.2d 1051 (Okla.Crim.App.1985); *Jones v. State*, 650 P.2d 892 (Okla.Crim.App.1982)), we do not find the expected analysis under that standard in the discussion that follows. Instead, the Oklahoma Court of Criminal Appeals engaged in the wrong inquiry – asking on rehearing whether Hogan's self-defense instruction constituted a lesser included instruction, or initially whether the evidence was sufficient to support conviction on the greater charge, but *never* engaging in the correct inquiry as to

whether Hogan presented sufficient evidence to warrant a first-degree manslaughter instruction.

Pursuant to AEDPA, the applicable standard of review depends on whether we characterize an examination of the sufficiency of the evidence for a lesser included offense instruction as a "determination of a factual issue," 28 U.S.C. § 2254(e)(1), or a legal conclusion. If the determination of insufficient evidence is a legal conclusion, we are to ask whether it was contrary to or an unreasonable application of clearly established Supreme Court precedent. *See* 28 U.S.C. § 2254(d)(1). If, on the other hand, it is a factual determination, we ask whether it represented "an unreasonable determination of the facts in light of the evidence presented," 28 U.S.C. § 2254(d)(2), and give the state court's determination a presumption of correctness that can be rebutted only by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1). As we recently noted in *Moore v. Gibson*, 195 F.3d 1152 (10th Cir. 1999) (citing cases), our precedents have not been consistent in their treatment of whether a question of sufficiency of the evidence represents a legal conclusion or a factual determination. *But cf. Bryson v. Ward*, 187 F.3d 1193, 1207 (10th Cir.1999) (treating determination that evidence did not support lesser included offense instructions as factual determination subject to presumption of correctness under 28 U.S.C. § 2254(e)(1)). We need not determine definitively which is the more appropriate analysis, however, because there is no finding discernible to us that is entitled to any kind of deference under the standards of review provided for by 28 U.S.C.

§ 2254(d)(2) & (e)(1).[6] *Deference to the state court under* AEDPA is only required for "any claim that was adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d); *see, e.g., Moore,* 195 F.3d 1152; *Wallace v. Ward,* 191 F.3d 1235 (10th Cir. 1999); *Hooks,* 184 F.3d at 1223. Here, because the Oklahoma Court of Criminal Appeals made no findings as to whether Hogan had presented sufficient evidence to warrant a first-degree manslaughter instruction, it is axiomatic that there are no findings to which we can give deference. As such, we will consider Hogan's *Beck* claim on the merits. *Hooks,* 184 F.3d at 1223. Since the state court did not decide the claim on its merits, and instead the federal district court decided the claim in the first instance, we review the district court's conclusions of law de novo and factual findings, if any, for clear error. *See, e.g., Moore,* 195 F.3d 1152; *LaFevers v. Gibson,* 182 F.3d 705, 711 (10th Cir.1999).

Although *Beck* did not establish a clear rule as to the precise quantum of evidence that would warrant an instruction on a lesser included offense, the *Beck* Court noted that "[i]n the federal courts, it has long been 'beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.' " *Beck,* 447 U.S. at 635, 100 S.Ct. 2382 (quoting *Keeble v. United States,*

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[6] We note that although we cannot resolve this inconsistency, this panel unanimously agrees that the correct approach is to treat a determination of the sufficiency of the evidence for a lesser included offense instruction as a conclusion of law. *See Bryson,* 187 F.3d at 1210-13 (Briscoe, J., concurring).

412 U.S. 205, 208, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973)).[7] This Circuit has since adopted and applied that standard in considering the sufficiency of the evidence of a lesser included offense for *Beck* purposes on habeas review. *See, e.g., Hatch v. Oklahoma*, 58 F.3d 1447, 1454 (10th Cir.1995) (denying *Beck* claim because "there is not 'evidence, which, if believed, could reasonably have led to a verdict of guilt of a lesser offense' ") (quoting *Hopper v. Evans*, 456 U.S. 605, 610, 102 S.Ct. 2049, 72 L.Ed.2d 367 (1982)); *Parks v. Brown*, 840 F.2d 1496, 1499-1502 (10th Cir.1987), *rev'd on other grounds*, 860 F.2d 1545 (10th Cir.1988) (en banc), *rev'd on other grounds sub nom. Saffle v. Parks*, 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990); *see also Cordova v. Lynaugh*, 838 F.2d 764, 767 (5th Cir.1988), overruling on other grounds recognized by *Vanderbilt v. Collins*, 994 F.2d 189, 195 (5th Cir.1993) (holding that "the federal standard – a lesser included offense must be given when a jury could rationally convict of the lesser offense and acquit on the greater offense – is equivalent to the *Beck* standard").[8] To succeed in his claim that the trial

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[7] The Court in *Beck*, 447 U.S. at 636 n. 12, 100 S.Ct. 2382, surveyed the practice of the states and found it consistent with this standard.

[8] We note that the sufficiency standard for lesser included instructions in Oklahoma, *see* Okla. Stat. tit. 22, § 916, is consistent with the standard cited in *Beck* and adopted by this Circuit. *See Beck*, 447 U.S. at 636 & n. 12, 100 S.Ct. 2382 (discussing various state descriptions of quantum of proof required for a lesser included offense instruction and characterizing all as consistent with the standard "where the evidence warrants it"); *Boyd v. State*, 839 P.2d 1363, 1367 (Okla.Crim.App.1992) (holding that trial courts are required to instruct the jury "on every degree of homicide which the

court's failure to instruct the jury on first-degree manslaughter violated *Beck*, Hogan must demonstrate that the evidence presented at trial would permit a rational jury to find him guilty of first-degree manslaughter and acquit him of first-degree murder. *See Hopper*, 456 U.S. at 610, 102 S.Ct. 2049.

The relevant portion of Oklahoma's first-degree manslaughter statute defines the crime as homicide "perpetrated without a design to effect death, and in a heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon." Okla. Stat. tit. 21, § 711(2).[9] Heat of passion and the lack of design to effect death are related requirements: "[T]he 'heat of passion must render the mind incapable of forming a design to effect death before the defense of manslaughter is established.' " *Allen*

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evidence in any reasonable view suggests"); *Shrum*, 1999 OK CR 41 (holding that trial court "must include all lesser included offenses supported by the evidence"); *see also Le*, 947 P.2d at 546 (holding that where there is evidence of intent and a first-degree murder instruction is given, a heat-of-passion manslaughter instruction is also required if evidence exists to support a conviction under Oklahoma's manslaughter statute).

[9] By contrast, under Oklahoma law, "[a] person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof." Okla. Stat. tit. 21, § 701.7(A). The design to effect death "is inferred from the fact of killing, unless the circumstances raise a reasonable doubt whether such design existed." Okla. Stat. tit. 21, § 702. Moreover, "[a] design to effect death sufficient to constitute murder may be formed instantly before committing the act by which it is carried into execution." Okla. Stat. tit. 21, § 703.

v. State, 821 P.2d 371, 374 (Okla.Crim.App.1991) (quoting *Walker v. State*, 723 P.2d 273, 284 (Okla.Crim.App.1986)); *see generally Brown v. State*, 777 P.2d 1355, 1358 (Okla.Crim.App.1989) (explaining that Oklahoma subscribes to the "minority view" of first-degree manslaughter that requires both heat of passion and no design to effect death). "The elements of heat of passion are 1) adequate provocation; 2) a passion or emotion such as fear, terror, anger, rage or resentment; 3)[the] homicide occurred while the passion still existed and before a reasonable opportunity for the passion to cool; and 4) a causal connection between the provocation, passion and homicide." *Charm v. State*, 924 P.2d 754, 760 (Okla.Crim.App.1996) (citing *Allen*, 821 P.2d at 374).

The phrase "a design to effect death" is treated as synonymous with "an intent to kill." *See, e.g., Smith v. State*, 932 P.2d 521, 532-33 (Okla.Crim.App.1996). Thus, under Oklahoma law, even if a person kills in the heat of passion, the killing may not be classified as first-degree manslaughter if the person intended death to result from the act. A defendant is thus entitled to a manslaughter instruction only if the evidence at trial would allow a jury to rationally conclude the defendant's rage rendered him or her incapable of forming a design to effect death. *See Allen*, 821 P.2d at 374.

We agree with the district court that the Oklahoma Court of Criminal Appeals, on direct appeal, failed "to consider what, if any, evidence supported Hogan's theory of manslaughter." *Hogan III*, No. CIV-97-134-R, at 14. The Oklahoma Court of Criminal Appeals stated:

> [H]eat of passion alone does not reduce a homicide to manslaughter without adequate provocation. We have held the fatal blow or blows must be the unpremeditated result of the passion aroused. The statement of the defendant plus the facts show that the blows did not come because of any overt acts on the part of the deceased, but came because the defendant believed the reporting of attempted rape, together with his pending burglary charge, would result in his imprisonment.

Hogan I, 877 P.2d at 1160 (internal citation omitted). Despite having paraphrased the contents of Hogan's confession in its recitation of the facts of the case, *see id.* at 1159-60, the state appeals court's analysis excerpted above does not confront the merits of Hogan's *Beck* claim. The *Hogan I* majority fails completely to discuss Hogan's statements in his confession that the victim initially committed the overt act of coming at him with a knife and that the murder weapon was the knife with which she originally attacked him. Nor does the court acknowledge, in determining that the evidence was insufficient to warrant a manslaughter instruction, that Hogan's knife injuries were corroborated by medical personnel at the hospital where Hogan sought treatment after the murder.

Absent, too, is any mention of Hogan's statement that he thought Stanley was running to the kitchen to retrieve another knife when he began to stab her. Specifically, Hogan told the police the following:

> I was putting my coat on . . . and she just pushed [the knife] right at me . . . I didn't know what to say, do, or think, I just grabbed the knife . . . and it hurt, it hurt, cause when I grabbed it, she pulled it back and she swung at

> me again and got there, that's when I just sw [sic] . . . just bent it down and it just come right out of her hand and she just ran back toward the kitchen like she was gonna get another one and I, and I just knew that she was gonna tell the Police that I'd tried to rape her, that's why she cut me and I knew they'd believe her over me cause I, cause I have burglary charges against me. . . .

(Hogan Interview at 3-4 (ellipses in original).) Under Oklahoma law, homicide in response to a victim's unprovoked attack with a dangerous weapon may constitute first-degree manslaughter. *See Le*, 947 P.2d at 546 & n. 21 (citing *Hayes v. State*, 633 P.2d 751, 752 (Okla.Crim.App.1981); *Farmer v. State*, 565 P.2d 1068, 1070 (Okla.Crim.App.1977); *Williams v. State*, 513 P.2d 335, 336-38 (Okla.Crim.App.1973)).

Furthermore, the confession, along with other testimony introduced at trial, demonstrates that the victim and defendant had a longstanding, close relationship prior to the homicide, and that the defendant was visiting the victim at her request in order to assist her in writing a book report for a class she was taking. There was no evidence introduced at trial that the defendant and victim had ever assaulted each other, or even argued prior to the homicide. Finally, Hogan's confession alleged Stanley "got a wild look in her eye" immediately prior to attacking him with a knife, and that he and the victim were both consumed by the passion of their argument.

Although Hogan's confession, along with other evidence in the record, can be read to support a conclusion that Hogan killed Stanley out of his fear of incarceration,

it also may be used by a jury to rationally find that Hogan had established adequate provocation and a causal connection between Stanley's initial attack and the homicide. The confession also may evidence Hogan's fear that the victim was attempting to get another knife, that his anger and rage arose from the argument that consumed the two close friends, and that he acted before there was any reasonable opportunity for his passion to cool. In conclusion, these elements of Hogan's confession could lead a reasonable jury to find adequate provocation, heat of passion resulting from fear and terror, causation, and immediacy, so as to warrant a first-degree manslaughter instruction. *See Le*, 947 P.2d at 546-47; *Charm*, 924 P.2d at 760; *see also Wood v. State*, 486 P.2d 750, 752 (Okla.Crim.App.1971) ("It is the general rule that passion resulting from fright or terror may be sufficient to reduce a homicide from murder to manslaughter and such a killing may be closely akin to a killing in self-defense.") (citation omitted).

Hogan's confession, the central facet of the case against him, also could have led a reasonable jury to conclude that his heat of passion rendered him incapable of forming a design to effect death. Hogan described the killing as follows: "[I]t was like I wasn't even there . . . just somebody else . . . it wasn't even me. . . . It was stabbing her and I couldn't stop him." (Hogan Interview at 4.) In his confession, Hogan also specifically denied intending to kill Stanley: "I didn't even realize that I'd killed her until the next day, all I knew was my hand hurt and she was dead," (*id.*); "I mean I didn't do it on purpose, I can't even sleep at night without waking up," (*id.*); "I didn't mean to hurt her," (*id.* at 3). While a jury

might have disbelieved these statements as self-serving, had it believed them, it could have concluded Hogan's fear and anger rendered him incapable of forming the requisite intent.

The facts of this case strikingly resemble those of *Williams*, 513 P.2d at 335, in which the Oklahoma Court of Criminal Appeals found that a first-degree manslaughter instruction was warranted. The defendant in *Williams*, who was the only witness to his murder of his wife, testified in his own defense and provided a description of the crime remarkably similar to that which the jury in Hogan's trial heard in Hogan's confession to the police. Following an argument in which his wife warned him that "I think I'll just cut your black heart out," *Williams* testified:

> [S]he went through that room that went into her bedroom, which was the short way to the kitchen and I had this pistol right there beside my bed in the bottom drawer and I picked it up thinking that she would probably come back. . . . [A]nd then I discovered she was using the telephone and I walked over there and I said "Honey don't call, don't call. I'll leave." And the next thing I saw was something up here which I thought was a butcher knife and I had the pistol in my left hand. I didn't have no idea of using it. I was going to try to protect myself to get out of the house and I wanted to stop her from making the telephone call. So she drew back and swung at me and I threw my right arm to try to ward off the blow and she missed me. I don't know if she even touched me or not. I just don't know and I just had the gun down there and I just pulled the trigger and when it went off . . . I've

> shot a .45 pistol a lot in training bird dogs to keep them from going gun-shy as a puppy, but in an inclosure I had never heard one and I'll tell you honestly it's a terribly loud noise and I just went blank and just stood there just pumping that gun.

Id. at 336 (ellipsis in original). As in Hogan's confession, the assailant attempted to leave the scene prior to the homicide but claimed he was barred from doing so by the victim; as in Hogan's confession, the victim attacked first with a knife; and as in Hogan's confession, the assailant described the killing itself in distanced, passive terms – "I just went blank and just stood there just pumping that gun," *id.*, in *Williams*'s case, and "[I]t was like I wasn't even there . . . just somebody else . . . it wasn't even me. . . . It was stabbing her and I couldn't stop him," in Hogan's. (Hogan Interview at 4.) Just as Hogan stabbed his victim multiple times, creating three wounds that would have been independently fatal, the defendant in *Williams* shot his wife eight times at close range, and expert testimony at trial stated that any one of five wounds could have independently been fatal. *See Williams*, 513 P.2d at 336. In short, the circumstances surrounding Hogan's attack and the attack itself bear a striking resemblance to those before the court in *Williams*.

After reviewing the defendant's testimony in *Williams*, the Oklahoma Court of Criminal Appeals concluded that "[t]he jury might reasonably interpret the evidence to show that the initial firing of the gun was caused by a sudden and unexpected attempt to attack defendant with a pair of scissors and fired by the defendant while in a heat of passion," and that a jury could

have interpreted the defendant's testimony as proof of a "lack of a premeditated design to effect death." *Id.* at 338. Therefore, the *Williams* Court held that the trial court committed reversible error in failing to give the jury a first-degree manslaughter instruction. *Id.* at 338-39. In the case before us, a jury could reasonably interpret Hogan's description of his initial stabbing of Stanley as a response, made in the heat of passion, to her knife attack, based on his belief that, having been disarmed, Stanley was running to the kitchen to obtain another weapon. Under Oklahoma's own law in *Williams*, Hogan's confession constitutes sufficient trial evidence of heat of passion and lack of intent to kill presented at trial to warrant a first-degree manslaughter instruction, and that a reasonable juror could have convicted Hogan of manslaughter and acquitted him of first-degree murder.

The district court, after concluding the state appellate court conducted an incorrect legal analysis of Hogan's *Beck* claim, nevertheless found the evidence at trial insufficient to support an instruction on a lesser included offense. *See Hogan III*, No. CIV-97-134-R, at 14-15. We disagree. Most significantly, the district court dismissed the contents of Hogan's confession – including its description of the events leading up to the murder and of the murder itself – as mere "self-serving statements" that "are insufficient to support manslaughter instructions." *Id.* at 15 (citing *Ross v. State*, 717 P.2d 117, 121 (Okla.Crim.App.1986), *affirmed*, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988)). Hogan's confession, however, was the centerpiece of the government's case and is the only account in the record of the murder itself. As discussed above, the ambiguity of the statements therein

permit reasonable inferences of both first-degree murder and first-degree manslaughter. It is unreasonable to recognize the confession for only one of these possible inferences: that Hogan, motivated by fear and anger that Stanley might wrongly accuse him of rape, acted with malice and intent to kill. Given the centrality of the confession to the case, it is unreasonable to ignore it to the extent it supports an alternative inference, one that is inculpatory as to first-degree manslaughter and exculpatory as to first-degree murder: that Hogan, reacting to adequate provocation, acted in a heat of passion and without a design to effect death.[10]

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[10] The fact that a confession may be to some degree self-serving does not deprive a jury of its prerogative to consider that fact in evaluating the credibility of a claim of provocation and passion. *See, e.g., Provo v. State*, 549 P.2d 354, 356-57 (Okla.Crim.App.1976); *Williams*, 513 P.2d at 338. *Ross* held that self-serving statements of wishing merely to wound, combined with expressions of regret, were insufficient to warrant a first-degree manslaughter instruction. *Ross*, 717 P.2d at 121-22 (citing *Lumpkin v. State*, 683 P.2d 985, 988 (Okla.Crim.App.1984)). Viewed in light of the consideration of such statements in cases such as *Williams*, however, it is obvious the insufficiency of evidence for a manslaughter instruction in *Ross* stemmed not merely from the self-serving character of the statements but also from the absence of any of the other elements of first-degree manslaughter. *See* Okla. Stat. tit. 21, § 711 (defining elements of manslaughter in the first degree). Such an interpretation of *Ross* is mandated by its citation to *Lumpkin*, which nowhere holds that self-serving statements are categorically inadmissible, but rather rejects arguments regarding heat of passion and misdemeanor manslaughter instructions for lack of any evidence regarding heat of passion and an underlying misdemeanor, respectively. *See* 683 P.2d at 988.

The district court also erroneously concluded that the multiple stab wounds Hogan inflicted upon Stanley, viewed by themselves, "clearly indicate[ ] Hogan had a 'design to effect death,' " and that Hogan was therefore not entitled to manslaughter instructions. *Hogan III*, No. CIV-97-134-R, at 16; *see* Okla. Stat. tit. 21, § 702 (providing the fact of killing permits an inference of design to effect death absent reasonable doubt arising from the circumstances). Under Oklahoma law, depending on the evidence as to the totality of the circumstances surrounding the homicide, a defendant may still be eligible for a first-degree manslaughter instruction even where the defendant is alleged to have caused multiple, independently-fatal wounds. *See Williams*, 513 P.2d at 336-39; *cf. Duvall v. State*, 825 P.2d 621, 627 (Okla.Crim.App.1991) (considering "the nature of [numerous stab] wounds and surrounding circumstances," including no evidence of heat of passion, in holding that no instruction on manslaughter was required in a capital murder trial). Furthermore, we reiterate that under Oklahoma law, evidence of intent does not necessarily prohibit a court's issuing an instruction on manslaughter. *See supra* note 5 (quoting Le, 947 P.2d at 546).

Nevertheless, respondent-appellee argues, under *Darks v. State*, 954 P.2d 152 (Okla.Crim.App.1998), that premeditation can be inferred directly from the homicide itself, without considering the circumstances thereof.[11] *Cf.*

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[11] While we are bound to defer to state courts' "subsidiary interpretations of state law," *Boyd*, 179 F.3d at 917 (citing *Davis*, 100 F.3d at 771), we note that no Oklahoma state court – certainly not the court reviewing Hogan's claims – has

Okla. Stat. tit. 21, § 702 ("A design to effect death is inferred from the fact of killing, unless the circumstances raise a reasonable doubt whether such design existed."). In *Darks*, 954 P.2d at 161, the court found that four gunshots made at close range to vital parts of the victim's body led to the conclusion that there was insufficient evidence to warrant a manslaughter instruction. The key, undisputed circumstances of the homicide in *Darks*, however, which involved multiple gunshots to the head and back and no mutual combat, are clearly distinguishable from the facts in the case before us. Darks and his victim had a longstanding animosity over the custody of their child, and the victim had called the police immediately before the murder and claimed that the defendant had run her car off the road and taken the child from her. *See id.* at 156-57. Accordingly, we cannot conclude that the Court of Criminal Appeals in *Darks* impliedly overruled its own long-established case law, which holds that the quantity and quality of the wounds cannot be viewed by themselves to be irrefutable evidence of premeditation precluding a first-degree manslaughter instruction.[12]

As discussed above, despite the circumstantial evidence of intent provided by the nature of the killing, there was also direct testimonial evidence by Hogan that he lacked a design to effect death. *Beck* requires that

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interpreted *Darks* as urged by the appellee in this case. We owe no deference to a novel view of state law urged by a party to a case and never enunciated by a state court.

[12] Our rejection of appellee's urged interpretation is bolstered by the statutory instruction to consider whether accompanying circumstances permit a "reasonable doubt"as to intent to kill. Okla. Stat. tit. 21, § 702.

where the evidence supports such alternative theories, the jury be presented the option to choose between them, and not only to choose between a capital conviction and acquittal.

Based on our review of the record, we conclude that petitioner-appellant's constitutional rights were violated by the trial court's refusal to instruct the jury on first-degree manslaughter, despite evidence sufficient to warrant the instruction; that the Oklahoma Court of Criminal Appeals acted contrary to established Supreme Court precedent in its review of Hogan's *Beck* claim because of its failure to query whether the evidence was sufficient to warrant a lesser included offense instruction; and that the district court's conclusion that the evidence was insufficient to warrant the instruction was erroneous.

Hogan himself confessed to committing a reprehensible act of violence. By denying the jury the option to convict him on a lesser, non-capital offense supported by the evidence, thus leaving only a choice between conviction of capital murder and acquittal, Oklahoma may have "encourage[d] the jury to convict for an impermissible reason – its belief that the defendant is guilty of some serious crime and should be punished." *Beck*, 447 U.S. at 642, 100 S.Ct. 2382. Hogan must, therefore, be retried.[13]

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[13] A *Beck* error can never be harmless. *See Hopper*, 456 U.S. at 610, 102 S.Ct. 2049 ("[T]he jury [in a capital case] must be permitted to consider a verdict of guilt of a noncapital offense 'in every case' in which 'the evidence would have supported such a verdict.' "). As the Fifth Circuit has noted, "[t]he nature of the initial [*Beck*] inquiry itself is very similar to a harmless error analysis. If the instruction was refused, but the jury could

Having reached that conclusion, we decline to consider the other trial-related issues Hogan raises in his appeal – including his claim counsel rendered ineffective assistance in failing to seek a second-degree murder instruction – because they may not recur in his retrial. *See, e.g., United States v. Torrez-Ortega*, 184 F.3d 1128, 1137 n. 8 (10th Cir.1999); *United States v. Sullivan*, 919 F.2d 1403, 1421 (10th Cir.1990).

IV

The judgment of the district court denying the writ is reversed. We **REVERSE** and **REMAND** to the district court to grant the writ, conditioned upon the retrial of Hogan by the State of Oklahoma.

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not rationally convict on the lesser offense, then the alleged error would be harmless. In other words, the harm is subsumed in the test itself." *Cordova*, 838 F.2d at 770 n. 8.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

KENNETH EUGENE HOGAN, Petitioner,	)	CIV-97-134-R
v.	)	
RON WARD, Warden, Oklahoma State Penitentiary, Respondent.	)	

MEMORANDUM OPINION AND ORDER

(Filed Apr. 24, 1998)

This matter comes before the Court for consideration of a petition for a writ of habeas corpus filed by Oklahoma death row inmate Kenneth Eugene Hogan pursuant to 28 U.S.C. §§ 2241 and 2254. Petitioner, appearing through counsel, challenges his conviction in Oklahoma County District Court, Case No. CRF-88-646, for the January 28, 1988 murder of Lisa Stanley. Petitioner contends the judgment and sentence imposed are unlawful. Respondent, Ron Ward, responded in opposition to the petition. The Court notes that all trial transcripts have been produced. Having reviewed the record and the parties' submissions, the Court finds as follows.

BACKGROUND

Procedural History

Petitioner is confined in the Oklahoma State Penitentiary pursuant to a Judgment and Sentence of the District Court of Oklahoma County, Case No. CRF-88-646, entered on November 3, 1988. A jury convicted Hogan of Murder in the First Degree, a violation of Okla. Stat. tit. 21 § 701.7. The State's Bill of Particulars sought the death penalty on the basis of three aggravating circumstances: (1) the murder was especially heinous, atrocious, or cruel; (2) the murder was committed for the purposes of avoiding a lawful arrest or prosecution; and (3) the existence of a probability the defendant would commit criminal acts of violence that would constitute a continuing threat to society. The jury found the existence of one aggravating circumstance; the murder was especially heinous, atrocious, or cruel. The jury further also determined that the aggravating circumstance outweighed the mitigating evidence. Therefore, the jury recommended Hogan be sentenced to death. The Honorable James L. Gullett, District Judge, sentenced Hogan in accordance with the jury's verdict.

Petitioner was represented at trial and on appeal by Irven R. Box and Diane Clowdus Box. Hogan appealed his conviction and sentence to the Oklahoma Court of Criminal Appeals. On June 8, 1994, the Oklahoma Court of Criminal Appeals affirmed Hogan's conviction and sentence in a written opinion. *Hogan v. State*, 877 P.2d 1157 (Okla. Crim. App. 1994). A subsequent petition for rehearing was denied on July 27, 1994. *Hogan v. State*, 877 P.2d 1157, 1167 (Okla. Crim. App. 1994). On February 21,

1995, the United States Supreme Court denied Hogan's petition for writ of certiorari. *Hogan v. Oklahoma*, 513 U.S. 1174 (1995). Petitioner filed an application for post-conviction relief in the District Court of Oklahoma County. No evidentiary hearing was held and the Court denied the petition on November 22, 1995. On December 19, 1996, the Oklahoma Court of Criminal Appeals affirmed the denial of Hogan's application for post-conviction relief. Petitioner filed this action seeking federal habeas relief on June 30, 1997.

In this Petition, Hogan raises the following issues: (I) denial of due process and a fair trial by the court's refusal to instruct on lesser included offenses; (II) improper self-defense instructions violated his constitutional rights; (III) the trial court's failure to give voluntary intoxication instructions violated his due process rights; (IV) the State's failure to conduct promised testing of evidence violated his constitutional rights; (V) prosecutorial misconduct deprived him of a fair trial; (VI) the trial court erred in permitting the prosecution to introduce into evidence a knife that was not the weapon used to kill Lisa Stanley; (VII) the trial court's failure to define "life without parole" violated his due process rights; (VIII) the trial court erred in admitting hearsay testimony of a child's statement during the sentencing phase; (IX) the trial court's instruction on the "heinous, atrocious, or cruel" aggravating circumstance was unconstitutionally vague; (X) the state's failure to timely provide notice of the second stage evidence violated his constitutional rights; (XI) numerous sentencing instructions deprived him of his constitutional rights; (XII) the trial court's failure to exclude other crimes evidence violated his constitutional

rights; and (XIII) he was deprived of the effective assistance of counsel.

Factual Background

The facts surrounding the underlying conviction are as follows. On January 28, 1988, at approximately 8:15 p.m., George Stanley returned from work to the apartment he shared with his wife Lisa, at 1345 Southwest 74th Street, Oklahoma City. Upon his arrival, he discovered his wife's dead body lying in the living room, behind the couch. (TR. 671, 678-79). Lisa Renee Stanley had been stabbed some twenty-five times in the head, neck, chest, and back. Her throat was cut through the larynx. (TR. 863-879).

Police were called to the scene, and their investigation revealed clear evidence of a struggle, but there was no sign of forced entry. (TR. 713-18). Some furniture had been turned over or knocked around. (TR. 714-15). Wedding pictures were thrown on the floor. A purse was emptied onto the dining room table. (TR. 716). The bathroom door had been kicked in. (TR. 716). In the bathroom detectives found a large butcher knife and red stains, which appeared to be blood, in the sink. (TR. 716). The police gathered blood samples, hair and fiber samples, and other evidence from the scene, including the victim's clothing and carpet from the apartment.

George Stanley testified he had met Hogan four or five times before Lisa's death (TR. 674). Lisa and Ken Hogan were friends from church. (TR. 676). George Stanley was unaware his wife and Hogan were such good friends and saw one another as often as they did. (TR.

691). George testified that on January 22, 1998, Hogan came to the Stanley apartment in the afternoon. (TR. 675). He further testified that during this visit, Hogan asked him why he was home, and what his normal work schedule was. (TR. 677-78). Hogan talked about martial arts class and how he learned to use a knife on the vital parts of the body. (TR. 676). Hogan exhibited a knife (TR. 676). After Hogan left, Lisa Stanley said she did not want him to visit. (TR. 677).

George Stanley testified that on January 28, 1988 he and his wife smoked marijuana between approximately 11:00 and 11:45 a.m., before he left for work. (TR. 672). Mr. Stanley left for work at approximately 11:45 a.m., and did not speak to his wife again. (TR. 672-73). The next time he saw her was when he returned home from work and discovered her body. (TR. 678).

During the course of the police investigation, Petitioner's name was mentioned by George Stanley. Mr. Stanley indicated Petitioner was a friend of the victim. Police questioned Hogan, and on February 3, 1988, after speaking with Detective Horn, Petitioner made a number of statements. He ultimately confessed to killing Lisa Stanley. From the evidence gathered at the scene and Hogan's statement, evidence of the following was admitted at trial.

Hogan arrived at Lisa Stanley's home on January 28, 1988, after George Stanley left for work. (Statement of Hogan, hereinafter "Statement," at 1[1]). Hogan and Lisa

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[1] In the statement, Hogan told police Lisa Stanley had called him on Wednesday, and asked him to come to her home to help pick a book for a book report. (Statement at 1).

Stanley smoked marijuana. Hogan had told his wife, Tiffany, he was going to work in Purcell, Oklahoma, but instead went to Lisa Stanley's apartment. Hogan said Lisa Stanley asked him to steal a stereo for her. (Statement at 2). Hogan stated that he refused to do so, because at the time there were second degree burglary charges pending against him. (Statement at 2). When Hogan refused to steal a stereo, the two began arguing. (Statement at 2).

Hogan stated that he was going to leave the Stanley's apartment, but Lisa Stanley refused to allow him to go, throwing down a coat rack and yelling, "no, Ken; no, don't Ken." (Statement at 2-3). Petitioner alleged that Lisa Stanley told him she was going to call the Police and tell them Hogan was breaking into places again. (Statement at 3). She also said she would scream rape. (Statement at 3). Petitioner tried to quiet Lisa Stanley, but she ran into the bathroom and locked the door. Hogan tried to reason with her through the door. (Statement at 3). Petitioner kicked the door down, and told Lisa Stanley that if she made these accusations about him to the police, he would tell her husband, George, about things she had been doing. (Statement at 3).

Hogan stated that Lisa Stanley ran to the front door, opened it, and yelled for help. (Statement at 3). Hogan ran over and kicked the door shut, and told Lisa Stanley he was going to tell her mother about the abortion she had before marrying George. (Statement at 3). He further threatened to tell George about the abortion. Petitioner contends that Lisa Stanley "got a wild look in her eye, her eyes just got . . . big. . . . " (Statement at 3). He stated that Lisa Stanley went into the kitchen and returned as he was putting his coat on. When she returned, without saying a

word, she pushed a knife at him. In response, he grabbed the knife by its blade, cutting his hand. She pushed it at him again, and this time he grabbed the knife. (Statement at 3). Lisa Stanley ran back into the kitchen; Petitioner believed she was going to get another knife. (Statement at 4). He was frightened Lisa Stanley would tell the Police he had tried to rape her, and because of the outstanding burglary charges the Police would believe her over him. (Statement at 4).

After revealing this information to police, Hogan confessed to killing Lisa Stanley. "With the knife she cut me with and it wasn't . . . it was like I wasn't even there . . . somebody else . . . it wasn't even me . . . It was stabbing her and I couldn't stop him . . . that's right . . . I just went over to be friends, I didn't come over there to do any harm and now I've got to pay . . . it's not fair." (Statement at 4).

After stabbing Lisa Stanley numerous times, resulting in her death, Petitioner rearranged the room, hoping to create the effect of a fight between Lisa Stanley and an unknown intruder. (Statement at 4). Hogan cleaned his wounds and left the apartment. At approximately 1:45 p.m. on January 28, 1988, Hogan was admitted to the Moore Hospital (TR. 796-98). The emergency room clerk who processed Hogan testified he gave two different accounts of how his hand was injured. (TR. 797-98). The doctor who treated Hogan testified that the story Hogan related to her was a combination of the stories he told the processing clerk. (TR.907). The doctor testified that Hogan appeared well-oriented, and did not appear to be under the influence of drugs. (TR.908-910).

Tiffany Hogan, Petitioner's wife, was interviewed by police and testified at trial. She testified Petitioner asked her to tell the police he had been working in the garage of their home all day on January 28, 1988 (TR. 810). Mrs. Hogan told police her husband was not home on the day Lisa Stanley was killed; she also informed them of his request that she lie about his whereabouts. (TR. 810).

The knife used to stab Lisa Stanley was found in the bathroom of the Stanley apartment, with no blood stains on it. (TR. 825). The tip of the knife, which had broken off, was found near Lisa Stanley's body, stained with blood. (TR. 828). The quantity, however, was insufficient to test. (TR. 827). Blood stains were found throughout the apartment. Tom Bevel, a police blood spatter expert testified there were large amounts of blood at the end of the kitchen counter, in front of the sofa and on the carpet under the victim, and smaller amounts in the dining area. (TR 898). The blood in the bathroom was diluted and the pattern increased in volume as the trail led to the living room, although he could not determine the direction (TR. 900). The expert concluded from the blood spatters on the victim and the evidence at the apartment that Lisa Stanley was in an upright position during a portion of the stabbing. (TR. 900). The evidence indicated that the initial stabbing occurred in the kitchen, with the final blows in the adjacent living room area. (TR. 900-01).

LEGAL STANDARDS

Application of the AEDPA

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA" or "the Act") instituted sweeping

changes with regard to federal habeas corpus law, including substantial amendment of the circumstances under which federal habeas corpus review is available.

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)-(2). Further, "a determination of a factual issue made by a State court shall be presumed to be correct[,]" absent clear and convincing evidence presented by the petitioner that rebuts such finding. 28 U.S.C. § 2254(e)(1).

Petitioner contends the provisions of the AEDPA do not apply to his case, as it would require the retroactive application of legislation. Petitioner argues that because Lisa Stanley's killing, his trial and conviction, and his pursuit of state post-conviction remedies all took place before the April 24, 1996 effective date of the AEDPA, that application of its provisions would have an impermissible retroactive effect on his case.

There is no dispute Petitioner did not file this action until long after April 24, 1996, the effective date of the Act. Petitioner contends, however, that under the retroactivity analysis of *Landgraf v. U.S.I. Film Products*, 511 U.S. 244 (1994), the Act's provisions cannot be applied to him. In *Landgraf*, the Court held that provisions of Title VII amended during the pendency of Plaintiff's suit did not apply to her case. The Court finds *Landgraf* inapposite to Petitioner's case for the reason stated herein.

Petitioner argues that because the amended provisions of § 2254(d) alter the standard of review utilized by this Court, his substantive rights have been affected, raising retroactivity concerns. However, *Landgraf* involved a case already on file when the applicable statutory amendments were enacted. In the instant case, Petitioner killed Lisa Stanley prior to the amendments, and his state court proceedings were completed prior to the amendments. His federal habeas review has been limited in time to after the enactment of the amendments.

Petitioner's argument, if accepted, would require courts to ignore the amendments to § 2254(d) for any crime committed before the effective date of the AEDPA. Such a result would be illogical and would obviously frustrate the intent of Congress in altering the standard of review. Petitioner is entitled to relief if the Court finds that his conviction and sentence are in violation of federal constitutional law. Because Petitioner's case was not on file in this Court until after the effective date of the AEDPA, the Court need not engage in *Landgraf* retroactivity analysis. *See Lindh v. Murray*, ___U.S.___, 117 S.Ct. 2059, 2063 (1997) (the AEDPA applies to habeas cases only when filed after the date of the Act.)

The Standard of Review

Having determined that the new standards under the AEDPA apply, the Court must determine what those standards require. The Tenth Circuit has not yet interpreted the new standards quoted above. The Court therefore looks to the plain language of the Act to determine when habeas relief is available under the provisions of the AEDPA. Under the new standards, versus the old, the court gives deference to the state court's factual conclusions, without requiring that the state court have held a hearing or issued written findings of fact. The Court also gives greater deference to State court's legal conclusions.

State court adjudication of a legal issue is presumed correct. Such presumption is "rebutted only if the legal analysis constitutes an '**unreasonable application**' of '**clearly established law**' as determined by the U.S. Supreme Court." Kurt Hermansen *1996 Habeas Corpus Reform, A Handout Concerning Non-Capital Habeas Corpus Reforms Contained in the Antiterrorism and Effective Death Penalty Act of 1996* (1996) at *4; *see also, Drinkard v. Johnson*, 97 F.3d 751, 768 (5th Cir. 1996), *cert. denied*, ___U.S.___, 117 S.Ct. 1114 (1997), *overruling on other grounds recognized by, United States v. Carter*, 117 F.3d 262 (5th Cir. 1997).[2] The review is no longer plenary under all

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[2] Although this article is addressed to non-capital habeas reforms, Oklahoma is not covered by the provisions of "Special Habeas Corpus Procedures in Capital Cases," 28 U.S.C. § 2261-2266. Application of these provisions requires that Oklahoma have enacted certain safeguards, set forth in 28 U.S.C. § 2261(b)-(d). It is undisputed that Oklahoma cases do not qualify for "opt-in" treatment. *Duvall v. Reynolds*, ___F.3d___, 1998 WL 97748, *3 (10th Cir. 1998). Therefore, the

circumstances. Habeas relief is available on a mixed question of law and fact only if the state court decision "involved an unreasonable application of clearly established federal law as announced by the Supreme Court. *Id.* at 767-68. "Unreasonable application" requires more that mere disagreement. *Nobles v. Johnson*, 127 F.3d 409, 416 (5th Cir. 1997). An application of law is "unreasonable" only if reasonable jurists considering the issue would agree the state court ruling was incorrect. *Drinkard*, 97 F.3d at 769.

EXHAUSTION, WAIVER, AND THE PROCEDURAL BAR

Federal habeas corpus relief is not available to a state prisoner unless all state court remedies have been exhausted by the prisoner. 28 U.S.C. § 2254(b); *Harris v. Champion*, 15 F.3d 1538, 1554 (10th Cir. 1994). As a threshold issue in every habeas case, the Court must consider exhaustion. *Id.* Exhaustion is based on the tenet that "[s]tates should have the first opportunity to address and correct alleged violations of [a] state prisoner's federal rights." *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). However, a prisoner's failure to pursue the available state court remedies does not absolutely bar this Court's consideration of the claims. For example, the State may waive this defense by failing to raise it. "Likewise, some cases may present special circumstances that make it 'appropriate for an appellate court to address the merits

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non-capital provisions of the AEDPA, as opposed to the special procedures, apply to this case.

of a habeas corpus petition notwithstanding the lack of complete exhaustion.'" *Harris*, 15 F.3d at 1554 (quoting *Granberry v. Greer*, 481 U.S. 129, 131, 107 S.Ct. 1671, 1674, 95 L.Ed.2d 119 (1987)).

The Court must deny federal habeas relief in cases "in which a state prisoner has defaulted his claims in state court pursuant to an independent and adequate state procedural rule . . . unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. Principles of comity and finality underlie the application of the independent and adequate state law ground doctrine, just as they do the exhaustion requirement. If the state court denies habeas relief on independent and adequate state law grounds, review by this Court would illustrate a lack of respect for state procedural rules. *Id.*

In the Order Affirming Denial of Post-conviction Relief, Judge Johnson, writing for the Oklahoma Court of Criminal Appeals, determined that certain issues were raised on direct appeal, and therefore barred by the doctrine of *res judicata*. He also held that certain of Petitioner's claims, some of which are asserted in the instant petition, were barred by the doctrine of waiver, as Petitioner failed to raise the issues on direct appeal.

Respondent contends that seven of the claims asserted by Petitioner are procedurally barred because Petitioner failed to satisfy state procedural requirements.

These seven grounds are numbered I[3], II, VI, VIII, IX, X, and XI in the habeas petition.[4] These claims were not raised by Hogan on direct appeal; but rather were first presented during post-conviction proceedings. The Oklahoma Court of Criminal Appeals rejected these claims on state procedural grounds. Federal habeas relief is available on these claims only if Petitioner can show both cause for the default and actual prejudice resulting from the default; or where Petitioner establishes that failure to consider the claims will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750; *Romero v. Tansy*, 46 F.3d 1024, 1028 (10th Cir.), *cert. denied*, 515 U.S. 1148 (1995).[5]

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[3] Petitioner combines two arguments under issue I. The procedural bar is asserted only with regard to the trial court's failure to instruct the jury on second degree murder.

[4] With regard to claim XII, Petitioner's challenge to the trial court's refusal to define "life without parole," the Oklahoma Court of Criminal Appeals noted that this issue was not raised on direct appeal, and therefore it was barred. However, because of an intervening change in the law, the Court of Criminal Appeals addressed the merits of the issue. Therefore, the ineffective assistance of counsel is not considered with regard to this claim, as there is no procedural bar preventing this Court from reviewing the issue.

[5] Petitioner does not contend that a fundamental miscarriage of justice will occur if the Court declines to consider the merits of his claims. Therefore, the Court only considers whether Petitioner can establish cause and prejudice for his failure to raise these issues on direct appeal.

Hogan asserts the "cause" for his failure to raise issues on direct appeal was appellate counsel's ineffectiveness. In order to assess the constitutional effectiveness of Petitioner's counsel, the Court must review the merits of Hogan's defaulted claims and determine, first, whether appellate counsel's performance with respect to the issues was reasonably competent, and second, whether any deficiencies in counsel's representation with respect to those issues prejudiced Hogan's defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Brewer v. Reynolds*, 51 F.3d 1519, 1523 (10th Cir. 1995), *cert. denied*, 516 U.S. 1123 (1996). Accordingly, in order to determine the validity of Hogan's claims regarding the performance of counsel, the Court must address the merits of each claim in the Petition, regardless of whether the claims were held defaulted under Oklahoma law. The Issues are addressed in the same order in which presented in the Petition.

IA. The Trial Court Erred in Failing to Instruct the Jury on Manslaughter

Petitioner contends he was entitled to instructions on manslaughter, but the trial court erroneously denied his request in violation of his due process rights and his right to a fair trial. Hogan admits he stabbed Lisa Stanley resulting in her death, but contends he did not act with malice and therefore was not guilty of first degree murder. Petitioner raised the issue on direct appeal. The Oklahoma Court of Criminal Appeals denied relief, stating "[t]here is sufficient evidence to support the premeditation in this case, which includes the manner of the

killing and the pattern of the wounds." *Hogan*, 877 P.2d at 1160.

Habeas corpus relief is available only if a state conviction was obtained in violation of the United States Constitution, laws, or treaties. *Mabry v. Johnson*, 467 U.S. 504, 507 (1984); *Pulley v. Harris*, 465 U.S. 37, 41 (1984); *Smith v. Phillips*, 455 U.S. 209, 221 (1982); *Brinlee v. Crisp*, 608 F.2d 839, 843 (10th Cir. 1979), *cert. denied*, 444 U.S. 1047 (1980). It is also a well settled principle that a petitioner attacking a state conviction through federal habeas based on erroneous jury instructions bears a heavy burden. *Odum v. Boone*, 62 F.3d 327, 330 (10th Cir. 1995). This Court may overturn a state conviction based on improper jury instructions only where the instructions "so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973); *Maes v. Thomas*, 46 F.3d 979, 984 (10th Cir.), *cert. denied*, 514 U.S. 1115 (1995). When Petitioner alleges that the error was the trial court's failure to give an instruction, the burden of showing a due process violation is especially heavy. *Hendricks v. Vasquez*, 974 F.2d 1099, 1106 (9th Cir. 1992). *See also Devier v. Zant*, 3 F.3d 1445, 1465 (11th Cir. 1993), *cert. denied*, 513 U.S. 1161 (1995).

Petitioner was charged with one count of first degree murder. Under Oklahoma law, a person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Okla. Stat. tit. 21 § 701.7(A). "'Malice' is the deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof." *Id.* Hogan contends he was entitled to

instructions on manslaughter, defined as homicide "perpetrated without a design to effect death, and in a heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon; unless it is committed under such circumstances as constitute excusable or justifiable homicide." Okla. Stat. tit. 21 § 711.[6]

Respondent contends Petitioner was not entitled to manslaughter instructions, citing the decision of the Oklahoma Court of Criminal Appeals denying Petitioner's request for rehearing as support. Respondent also attempts to distinguish the Supreme Court's holding in *Beck v. Alabama*, 447 U.S. 625 (1980). The Court agrees with Respondent's arguments that Petitioner was not entitled to manslaughter instructions under Oklahoma law.

The Court of Criminal Appeals, when addressing this issue on direct appeal, did not go far enough with its analysis. The appropriate analysis required the court to

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[6] To warrant a manslaughter instruction, the evidence must "reasonably suggest that [the accused] committed the murder in the heat of passion and without an intent to kill." The "passion" necessary to support a manslaughter instruction must be so great as to "render the mind incapable of forming a design to effect death. . . . " The elements of heat of passion are 1) adequate provocation; 2) a passion or emotion such as fear, terror, anger, rage or resentment; 3) homicide occurred while the passion still existed and before a reasonable opportunity for the passion to cool; and 4) a causal connection between the provocation, passion and homicide.

Charm v. State, 924 P.2d 754, 760 (Okla. Crim. App. 1996), *cert. denied.* ___U.S.___, 117 S.Ct. 1560, 137 L.Ed.2d 707 (1997).

consider what, if any, evidence supported Hogan's theory of manslaughter. It was irrelevant that there was evidence of malice. Evidence of malice is not itself sufficient to preclude instructions on a lesser included offense. *Le v. State*, 947 P.2d 535, 546 (Okla. Crim. App. 1997). The shortcomings in the Court of Criminal Appeals' analysis do not require this Court to grant Petitioner habeas relief.

The evidence introduced at trial established that Petitioner and the victim had a fight, presumably supplying the "heat of passion" element required for manslaughter instructions under Oklahoma law. However, there is no evidence that the fight rendered Hogan so angry he was unable to form the intent to kill. There is also no evidence of the causal connection between the alleged provocation and the homicide. Hogan does not contend Lisa Stanley's threatening to accuse him of rape resulted in anger or fear so intense that he killed her. He argues he killed her because she came at him with a knife and because he believed she was going to hurt or kill him.

Additionally, the only evidence that Hogan did not intend to kill Lisa Stanley, that he did not act with a "design to effect death" were his self-serving statements, offered to the police as part of his confession. Such statements are insufficient to support manslaughter instructions. *Ross v. State*, 717 P.2d 117, 121 (Okla. Crim. App. 1986) (citing *Lumpkin v. State*, 638 P.2d 985 (Okla. Crim. App. 1984)). The manner of killing, twenty-two stab wounds, including four potentially fatal wounds, and her nearly-severed larynx, combined with the evidence that Lisa Stanley was chased through the apartment, undercut Petitioner's argument that he was entitled to manslaughter instructions.

Petitioner relies on *Provo v. State*, 549 P.2d 354 (Okla. Crim. App. 1976), *cert. denied*, 434 U.S. 1071 (1978), and *Tarter v. Oklahoma*, 359 P.2d 596 (Okla. Crim. App. 1961), in support of his petition. In both of these cases the appellate court ruled that a new trial was warranted because manslaughter instructions were improperly withheld. However, in *Provo*, the manner of killing, the beating of a shop owner during a robbery, supported the defendant's assertions that he did not intend to kill the man. "My intentions were to rob Mr. Kasner and knock him out and take what jewels and things I could, but not to hurt him. He put up a pretty hard fight. I hope he lives." *Id.* at 356. The proprietor died four days after the robbery. In *Tarter*, the court held that manslaughter instructions should have been given where the defendant shot the victim twenty (20) times in the legs, without warning. The defendant stated, however, that he shot the victim in the legs and was only trying to injure him. In neither of these cases did the wounds inflicted express the intent to kill that was obvious from Lisa Stanleys' wounds. The multiple stab wounds clearly indicates Hogan had a "design to effect death," and therefore, he was not entitled to manslaughter instructions.

Pursuant to *Beck*, a trial court is required to instruct a jury on lesser included offenses only if such offenses are supported by the evidence. *Duvall v. Reynolds*, ___F.3d___, 1998 WL 97748, *16 (citing *Beck*, 447 U.S. at 627). Petitioner stabbed Lisa Stanley twenty-two times, including a cut that almost severed her larynx. Given the nature and extent of her wounds, the Court is unable to find evidence that Hogan acted without a "design to effect death." Therefore, under Oklahoma law, the trial court

did not err in failing to instruct the jury on manslaughter, and Petitioner cannot rely on *Beck* for habeas relief. The Petition is denied on this basis.

IB. Second Degree Murder Instructions

Petitioner did not raise Issue IB, his entitlement to instructions on second degree murder, either at trial or on direct appeal. Although Petitioner alleges his failure to raise the issue was the result of ineffective assistance of counsel, the Court need not consider whether counsel was ineffective, because Petitioner was not prejudiced by their failure to raise the issue. *Strickland*, 466 U.S. at 696 (no need to consider both prongs of the test for ineffective assistance of counsel, if it is easier to dispose of a claim solely on the prejudice prong).

Petitioner contends the evidence at trial supported second degree murder instructions, as a lesser included offense of malice murder. "Homicide is murder in the second degree . . . [w]hen perpetrated by an act imminently dangerous to another person and evincing a depraved mind, regardless of human life, although without premeditated design to effect the death of any particular person." Okla. Stat. tit. 21 § 701.8. As discussed above, a capital defendant is entitled to jury instructions on lesser included offenses supported by the evidence. Petitioner claims his case fell into this category. This Court disagrees.

As discussed above, there is a lack of evidence that Hogan stabbed Lisa Stanley without a design to effect her death. The twenty-two stab wounds and the blood spatter

evidence indicate a struggle around the Stanley apartment, during which time Lisa Stanley was killed. There was insufficient evidence to support second degree murder instructions, and therefore, Hogan was not entitled to such.

Furthermore, a recent opinion from the Oklahoma Supreme Court invalidates Petitioner's argument. In *Willingham v. State*, 947 P.2d 1074 (Okla. Crim. App. 1997), the court considered whether "second degree 'depraved mind' murder is a lesser offense included in the offense of first degree malice murder." *Id.* at 1081. The court scrutinized the elements of both malice and depraved mind murder, and held:

> Under the earlier versions of our second degree murder statute . . . second degree murder was a lesser included offense of first degree murder. See 21 O.S. Supp. 1973 § 701.2. (Homicide is murder in the second degree when perpetrated with premeditation, but by an act not enumerated in the first degree murder section). However, when our murder statutes were amended in 1976, second degree "depraved mind" murder was no longer a lesser included offense of first degree "malice" murder. Apparently, our case law failed to recognize this change in the statutes. We now hold that second degree depraved mind murder is not a lesser included offense of first degree malice murder. Therefore, the trial court did not commit reversible error in refusing to give the instruction.

Id. Because *Beck v. Alabama*, 447 U.S. at 633-45, only requires instructions on lesser included offenses, the failure to give a second degree murder instruction, even if

warranted by the evidence, does not give rise to a due process violation. *Id.* at 6.

For the reasons stated herein, there was not prejudice to Petitioner by counsel's failure to raise the issue at trial or on appeal, and granting the writ of habeas corpus is improper on this basis.

II. Self-Defense Instructions

Petitioner contends his rights under the Sixth, Eighth and Fourteenth amendments were violated because the trial court improperly instructed the jury on the State's burden of proof with regard to self-defense. In his state habeas proceedings, the Court of Criminal Appeals refused to consider the claim on the merits, because Hogan had not raised it on direct appeal. Hogan contends ineffective assistance of appellate counsel was the basis for his failure to raise this issue on direct appeal. Specifically, Hogan asserts his counsel was ineffective for failing to challenge on appeal the trial court's decision to exclude Oklahoma Uniform Jury Instruction Criminal ("OUJI-CR") 745, requested by Hogan at trial. Although the Court of Criminal Appeals found the claim waived, it considered whether appellate counsel was ineffective for failing to raise the issue. Without analysis of the merits of the claim, the Court of Criminal Appeals denied relief.[7]

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[7] The Court of Criminal Appeals stated:

> After reviewing all the listed issues both in those failed to be raised and those in the inartful categories, Hogan failed in his burden to show how he was prejudiced. This claim is without merit.

(Order affirming denial of post-conviction relief at 7).

Because the Oklahoma Court of Criminal Appeals found Hogan waived this issue, the Court may only consider its merits if Hogan establishes cause for failing to raise this issue on direct appeal, and prejudice stemming therefrom. *Strickland,* 466 U.S. at 687. To show prejudice, Hogan must establish a reasonable probability that the outcome would have been different had this error not occurred. *Id.* at 694. In order to determine whether Hogan was prejudiced, the Court must consider the merits of his claim. In other words, what would have happened if appellate counsel had raised the issue?

"It is the burden of the state to prove beyond a reasonable doubt that the Defendant was not acting in self defense. If you find that the state failed to sustain that burden, then the Defendant must be found not guilty." OUJI-CR 745. In 1990, two years after Hogan was tried and convicted and during the pendency of his appeal, the Oklahoma Court of Criminal Appeals decided *Perez v. State,* 798 P.2d 639 (Okla. Crim. App. 1990); wherein it held that giving OUJI-CR 745 was mandatory in all cases in which the evidence supported a theory of self-defense. Petitioner contends that because the jury sitting on his case was not so instructed, that his rights were violated because it was unclear that the State bore the burden of establishing he did not act in self-defense.

Hogan, because his trial was held before *Perez,* was not entitled to relief solely because OUJI-CR 745 was not given. *Perez* specifically limited its holding to new cases, "applied from this day forward in this Court's appellate review of the sufficiency of jury instructions on the law of self-defense. This new standard does not alter the validity of our prior decisions in this area, nor will it be applied to

cases currently pending on appeal." *Id.* at 640. In *Howell v. State*, 882 P.2d 1086, 1092 (Okla. Crim. App. 1994), *cert. denied*, 514 U.S. 1113 (1995), the court explained how jury instructions on self-defense are analyzed in pre-*Perez* cases. The Court of Criminal Appeals "will look to the jury instructions as a whole to determine whether they adequately advise the jury of the State's shifting burden when self-defense is raised by the defendant."

The jury instructions given in Petitioner's trial included the following general instructions on the prosecution's burden of proof:

> To this charge, the Defendant has entered a plea of not guilty which casts on the State the burden of proving the material allegations of the Information to your satisfaction beyond a reasonable doubt before you would be justified in returning a verdict of guilty.
>
> The Information is simply the charge upon which the Defendant is placed upon trial, and sets forth in a formal way the offense of which the Defendant is accused, and it is in and of itself not evidence of the Defendant's guilt, and you should not allow yourselves to be influenced against the Defendant by reason of the filing of such Information.
>
> The Defendant is presumed to be innocent of the crime charged against him, and innocent of each and every material element constituting such offense, and this presumption of innocence continues until such time as his guilt is shown to your satisfaction beyond a reasonable doubt, and if, upon a consideration of all the evidence, facts and circumstances in the case you entertain a reasonable doubt of the guilt of the Defendant

> of the crime charged against him, you must give him the benefit of that doubt and return a verdict of not guilty.

(O.R. 131).

> Should you find from the evidence, under the instructions, and beyond a reasonable doubt, that the Defendant is guilty of Murder in the First Degree as charged in the Information, and as defined in these instructions, then you shall find the Defendant guilty as charged, but if you do not so find, or should you entertain a reasonable doubt thereof, then in either of said latter events you shall find the Defendant not guilty.

(O.R. 151).

The jury was instructed more specifically on self-defense:

> Evidence has been introduced of self-defense as a defense to the charge that the Defendant has committed the crime of Murder in the First Degree.

(O.R. 139).

> In this case, the Defendant, as one of his defenses, says that at the time of the difficulty he was acting in his necessary self-defense to protect himself from the unlawful attack of his adversary.
>
> The right of self-defense is given to the citizen for his protection, it cannot be pleaded as a defense and relied upon for an acquittal by one who himself is the aggressor. But one who is not the aggressor, when unlawfully attacked in such manner as to induce in him a reasonable believe [sic] that he is in danger of losing his life or of suffering great bodily harm, is not required

to retreat but has the right to stand his ground and use whatever force that seems necessary to repel the attack in order to save himself from death or to prevent what appears to him to be a threat of great bodily injury to himself.

It is not necessary to this defense that the Defendant's danger should have been actual or real. All that is necessary is that the Defendant, from his standpoint, had reasonable cause to believe, and did honestly believe, that there was imminent danger to his life or of great bodily injury being done to him. In determining whether or not the Defendant acted in his own necessary self-defense, you shall view the circumstances as they then existed from the standpoint of the Defendant.

You are instructed that the word "aggressor" as used in these instructions refers to and means the person who provoked the difficulty. To provoke the difficulty as used in these instructions means to willingly and knowingly use some language or do some act after meeting the antagonist reasonably calculated to lead to an affray or deadly conflict.

Should you find from the evidence in this case that the Defendant acted in his own necessary self-defense, as that term is defined in these instructions, or should you entertain a reasonable doubt thereof you should find the Defendant not guilty.

(O.R. 140-141).

A person is an aggressor when that person by his wrongful acts provokes, brings about, or

> continues an altercation. The use of words alone cannot make a person an aggressor.

(O.R. 142).

> A person is justified in using deadly force in self-defense if that person reasonably believed that use of deadly force was necessary to protect himself from imminent danger of death or great bodily harm. Self-defense is a defense although the danger to life or personal security may not have been real, if a reasonable person, in the circumstances and from the viewpoint of the Defendant, would reasonably have believed that he was in imminent danger of death or great bodily harm.

(O.R. 143). The question remains whether these instructions, considered as a whole, adequately informed the jury that the prosecution had the burden of proving Hogan was not acting in self-defense.

The Court has reviewed cases decided by the Oklahoma Court of Criminal Appeals, and the Court finds that in Hogan's case the Court of Criminal Appeals was not unreasonable in determining that Hogan failed to establish that his counsel's performance with regard to self-defense instructions prejudiced him. Although the Court of Criminal Appeals mandates that OUJI-CR 745 be given in cases where sufficient evidence of self-defense is presented, the instructions in Hogan's case, when considered in their entirety and in the context of previous decisions by the Court of Criminal Appeals, were not improper.

In *Cantrell v. State*, 562 P.2d 527 (Okla. Crim. App. 1977), the court considered a similar challenge to jury instructions. Cantrell requested, and the trial court

rejected, an instruction stating the State's shifting burden in self-defense cases, which requires it to prove beyond a reasonable doubt the defendant was not acting in self-defense. The instructions informed the jury that the State bore the burden of proving "beyond a reasonable doubt, upon consideration of all the facts, evidence and circumstances of the case, that the defendant was guilty as charged, and that in the event the jury should entertain a reasonable doubt thereon, they should acquit him." *Id.* The court found the general instructions on the burden of proof sufficient to inform the jury of the State's shifting burden. Given this holding, the Court cannot find that Court of Criminal Appeals erred in determining that Hogan was not prejudiced by counsel's failure to raise the issue of self-defense instructions on direct appeal. In light of the court's history, most notably *Cantrell*, there was no reasonable probability that but for counsel's failure to raise the issue on direct appeal. Hogan's conviction would have been overturned. The Oklahoma Court of Criminal Appeals is the best prognosticator of what its decision would have been, if an issue had been raised.

Even if the Court assumed that State court error resulted in a violation of Oklahoma law, he would not be entitled to habeas relief absent evidence that the error violated federal law. Hogan contends the instructions violated his due process rights because, if the jury followed the instructions, the State was not required to prove each element of its case beyond a reasonable doubt.

In Oklahoma, murder is defined as the unlawful killing of a person with malice aforethought. Okla. Stat. tit. 21 § 701.7. However, under Oklahoma law, the State is not

required to prove the absence of self-defense as an element of murder. *Davis v. State*, 665 P.2d 1186, 1197 ("the law in Oklahoma does not include the absence of self defense as an element of murder").[8] Therefore, even if the instructions were not sufficient to inform the jury of the State's shifting burden of proof, nothing in the instructions negated the requirement that the State prove each element of murder beyond a reasonable doubt. Therefore, there was no constitutional error in the instructions, and habeas relief would be inappropriate.[9]

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[8] If a defendant raises a defense of self-defense to a charge of murder, of course the State is required to prove that he was not acting in self-defense. However, the absence of self-defense is not an element of murder. A jury would only consider self-defense after deciding the State had proven that a defendant committed murder.

[9] Having reviewed the evidence in this matter, the Court feels compelled to comment on an issue not raised by the parties, the sufficiency of the evidence to support Hogan's theory of self-defense. The Court believes it is questionable whether the evidence was sufficient to establish that Hogan reasonably believed he was in immediate danger of death or serious bodily harm at the time he killed Lisa Stanley. The evidence presented indicates that Lisa Stanley was not in possession of a knife at the time Hogan stabbed her or that she was threatening him in any manner. Additionally, the Court queries why, when Lisa Stanley was debilitated by the initial stab wounds, Hogan continued to stab her, resulting in twenty-two wounds. The Court believes these facts undercut any theory of self-defense, and believes that the giving of self-defense instructions, regardless of whether they were erroneous, could not have prejudiced Hogan, because under the facts he was likely not entitled to such instructions.

III. Voluntary Intoxication Instructions

Petitioner next asserts his due process rights were violated because the trial judge refused to instruct the jury on voluntary intoxication. A criminal defendant is entitled to instructions on any defense that finds support in the evidence and the law. *Mathews v. United States*, 485 U.S. 58, 63 (1988) (citing *Stevenson v. United States*, 162 U.S. 313, 16 S.Ct. 839, 40 L.Ed. 980 (1896)).

"No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his having been in such condition." Okla. Stat. tit. 21 § 153. However, Oklahoma recognizes "an exception to this rule where the accused was so intoxicated that this [sic] mental abilities were totally overcome and it therefore becomes impossible for him to form criminal intent." *Crawford v. State*, 840 P.2d 627, 638 (Okla. Crim. App. 1992). Petitioner contends the evidence at trial established he was intoxicated at the time of the killing, and therefore, he was entitled to voluntary intoxication instructions.

In his statement to police, Hogan said, "we got high, we smoke some stuff and got high and we smoked some more, we smoked 2 bowls full out of a, out of a pipe I had."[10] However, Dr. Self, who treated Hogan at the Moore Community Hospital within one hour of the killing testified Hogan was oriented as to time, place and

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[10] Petitioner also contends that "[i]n subsequent interviews Mr. Hogan admitted he and Mrs. Stanley also had smoked a marijuana cigarette, which she later told him had been laced with PCP." (Petition at 31). However, the state court records are devoid of any evidence of such statement.

person when treated. (TR. 908). She further stated he seemed normal at the time, and not high. Her medical work requires consideration of whether patients are intoxicated or high, and Hogan did not seem to be. (TR. 909-10). Dr. Self also testified that Hogan did not act like he was on PCP. (TR. 910).

Petitioner's statement to police provided an insufficient factual basis from which the jury could have found that he "was under the influence of any intoxicant to the extent that he was unable to form the necessary intent to commit first degree malice murder." *Spears v. State*, 900 P.2d 431, 446 (Okla. Cr. App.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 678 (1995). Petitioner's allegation that he was entitled to voluntary intoxication instructions are contradicted by the detailed description he gave to police of what occurred at the Stanley apartment on the afternoon of Lisa Stanley's death. *See Crawford*, 840 P.2d at 638 (detailed description of the circumstances of a crime demonstrate the defendant was in control of faculties).

Petitioner's Reply brief attacks Respondent's argument, contending that this is not a sufficiency of the evidence question under *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). Petitioner's argument is misguided. The trial court was not required to give any defense instruction not supported by the evidence. The Oklahoma Court of Criminal Appeals found insufficient evidence of voluntary intoxication to warrant instructing the jury on the defense. The Court agrees. Hogan was not entitled to voluntary intoxication instructions. The writ is denied on this basis.

IV. Destruction of Evidence

Petitioner contends that because the state failed to preserve certain evidence, including blood and urine samples from the victim, he was denied due process. At the preliminary hearing Hogan's counsel requested that the medical examiner, Dr. Choi, perform a full drug screening of Lisa Stanley's blood. The screening was to include a check for marijuana. The State joined in the request. The requested testing was not completed because the medical examiner's office disposed of the victim's body samples. Hogan contends the destruction prevented any drug testing that might have supported his theory that the marijuana he and Lisa Stanley smoked was laced with PCP.

Shortly before trial a single vial of dried blood, scrapings from the crime scene, was discovered. Because the sample was so small only a single drug test could be conducted. The State conducted the test, but allowed Hogan to specify what drug to screen for. Hogan's counsel requested PCP. The test revealed no PCP in the sample. Petitioner nevertheless contends his constitutional rights were violated because the trial court refused to strike the Bill of Particulars filed in the action.

> Under the Due Process clause of the Fourteenth Amendment, the Supreme Court has developed " 'what might loosely be called the area of constitutionally guaranteed access to evidence.' " *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 2532, 81 L.Ed.2d 413 (1984) (quoting *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 102 S.Ct. 3440, 3446, 73 L.Ed.2d 1193 (1982)). The Court has specified that, to the

extent the Constitution imposes a duty upon the government to preserve evidence, "that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense" – i.e., evidence that is constitutionally material. *Id.* at 488-89, 104 S.Ct. at 2533-34. To be constitutionally material, evidence must: (1) "possess an exculpatory value that was apparent [to the police] before the evidence was destroyed," and (2) "be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* at 489, 104 S.Ct. at 2534. The mere possibility that lost or destroyed evidence could have exculpated a defendant is not sufficient to satisfy Trombetta's requirement that the exculpatory value be "apparent" to the police before destruction. *Arizona v. Youngblood*, 488 U.S. 51, 56 n. *, 109 S.Ct. 333, 336 n. *, 102 L.Ed.2d 281 (1988). Additionally, "if the exculpatory value of the evidence is indeterminate and all that can be confirmed is that the evidence was 'potentially useful' for the defense, then a defendant must show that the government acted in bad faith in destroying the evidence." *Bohl*, 25 F.3d at 910 (citing *Youngblood*, 488 U.S. at 58, 109 S.Ct. at 337). "[M]ere negligence on the government's part in failing to preserve such evidence is inadequate for a showing of bad faith." *Id.* at 912.

United States v. Parker, 72 F.3d 1444, 1451 (10th Cir. 1995). It is undisputed the blood and tissue samples were not tested for the presence of narcotics before their disposal, and therefore were only potentially exculpatory. Accordingly, in order to prevail on this claim, Hogan must show

that the State acted in bad faith in destroying the samples.

Petitioner first contends *Youngblood* applies and controls the outcome of this matter. "The information presently available reflects bad faith. The evidence was destroyed after the potential exculpatory value of it had been recognized by both sides." (Petition at 37). However, Petitioner fails to inform the Court of what information reveals bad faith. Both the prosecution and the defense requested that the victim's blood samples be tested. Unfortunately, the medical examiner destroyed the samples before conducting the requested testing. Neither the prosecution nor the defense knew the medical examiner had disposed of the samples, which was allegedly done because the police had not ordered the samples tested. No explanation was offered as to why the samples were destroyed after the preliminary hearing, when the parties requested testing.

The Court of Criminal Appeals, when evaluating this claim on direct appeal, found the "destruction of the evidence occurred through inadvertence and not bad faith." This factual finding is entitled to a presumption of correctness, unless Hogan rebuts the presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Petitioner has not rebutted this presumption, and the Court finds that there was no bad faith in the destruction of the samples.[11]

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[11] Petitioner first argues that *Youngblood* applies and that he can establish bad faith by the State in the destruction of evidence. He also argues, however, that *Youngblood* does not apply, because it was not a capital case. There is no case law to

Petitioner alternatively argues that even without a showing of bad faith the State violated his constitutional rights in a number of ways. Petitioner argues *Ake v. Oklahoma*, 470 U.S. 68 (1985), applies to this matter because there can "be no question expert assistance was required." (Petition at 38). However, *Ake* dealt with a criminal defendant's request for the appointment of an expert. Petitioner does not allege he requested the trial court to appoint him an expert and that such request was denied. Hogan argues that he did not procure an expert because the medical examiner was to act on his behalf and test the samples. However, absent evidence Hogan requested and was denied a necessary expert, *Ake* provides no support for his petition. The other cases cited by Petitioner are equally inapposite, and provide no support for his arguments. The writ is denied on this basis.

V. Prosecutorial Misconduct

Petitioner alleges prosecutorial misconduct during both the guilt/innocence and sentencing phases of trial. Hogan claims certain comments by the prosecutors during trial deprived him of a fair and impartial jury determination. Hogan raised the issue on direct appeal, and the Oklahoma Court of Criminal Appeals denied relief. *Hogan*, 877 P.2d at 1161-63. On post-conviction relief, the court refused to review the claim on the basis of *res judicata*.

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support this finding, and the Court declines to limit *Youngblood* to criminal cases involving non-capital offenses.

Hogan cites four areas of misconduct with regard to comments made by the prosecution during trial. Some of the allegations of error are from the closing argument offered during the first phase of trial, the guilt/innocence phase. Others arose during the closing arguments of the punishment phase. Hogan argues the comments set forth herein were improper and provide the basis for overturning his conviction or vacating his death sentence.

To warrant federal habeas relief, a prosecutor's remarks must be so egregious as to render the entire trial fundamentally unfair such that the resulting conviction violates due process. *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 645 (1974); *see also Mahorney v. Wallman*, 917 F.2d 469, 472 (10th Cir. 1990). "In evaluating whether improper prosecutorial comments render a trial fundamentally unfair, [the Court] view[s] the comments within the context of the trial as a whole. *Duvall v. Reynolds*, ___ F.3d ___, 1998 WL 97748, *25 (10th Cir. 1997) (citing *United States v. Young*, 470 U.S. 1, 11-12, 105 S.Ct. 1038, 1043-44, 84 L.Ed.2d 1 (1985)). In determining whether prosecutorial misconduct resulted in the denial of due process, the Court must "take notice of all surrounding circumstances, including the strength of the state's case." *Coleman v. Brown*, 802 F.2d 1227, 1237 (10th Cir. 1986), *cert. denied*, 482 U.S. 909 (1987). "[I]t is not enough that the prosecutor's remarks were undesirable or even universally condemned." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986).

Hogan urges the Court to use the standard set forth in *Mahorney*, 917 F.2d 469, 472 (10th Cir. 1990), which does not require proof that the entire trial was rendered fundamentally unfair. However, *Mahorney* applies only when a

petitioner alleges the prosecutor's statements violated a specific constitutional right, such as a comment on a defendant's failure to testify, in violation of the right to remain silent. Hogan does not make any such allegations, and therefore, the Court utilizes the fundamental fairness test discussed above. *Breechen v. Reynolds*, 41 F.3d 1343, 1355-56 (10th Cir. 1994), *cert. denied*, 515 U.S. 1135 (1995). Having reviewed the statements in consideration of the totality of circumstances of the trial, the Court finds the statements of the prosecution did not deprive Hogan of the fundamental fairness to which he is entitled under the Constitution.[12]

> To view the prosecutor's statements in context, we look first at the strength of the evidence against the defendant and decide whether the prosecutor's statements plausibly "could have tipped the scales in favor of the prosecution." . . . We also ascertain whether curative instructions by the trial judge, if given, might have mitigated the effect on the jury of the improper statements. . . . When a prosecutor responds to an attack made by defense counsel, we evaluate that response in light of the defense argument. . . . Ultimately, we "must consider the probable effect the prosecutor's [statements] would have on the jury's ability to judge the evidence fairly."

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[12] Petitioner begins his argument by citing to other cases where the prosecutors involved in his case were admonished for improper comments. However, these cases are irrelevant to Hogan's case. The Court focuses on what was said at Hogan's trial, not at other trials involving the same prosecutors.

Fero v. Kerby, 39 F.3d 1462, 1474 (10th Cir. 1994), *cert. denied*, 515 U.S. 1122 (1995) (quoting *Hopkinson v. Shillinger*, 866 F.2d 1185, 1210 (10th Cir. 1989), *overruled on other grounds, Sawyer v. Smith*, 497 U.S. 227 (1990)) (internal quotations and citations omitted). The Oklahoma Court of Criminal Appeals reviewed Hogan's allegations of prosecutorial misconduct and found no prosecutorial misconduct. *Hogan*, 877 P.2d at 1163.

A. The Prosecution Argued Facts Not in Evidence

During closing argument of the guilt/innocence phase, the prosecution offered the following:

> MS. STENSAAS [Prosecution]: First of all, George Stanley testified. George Stanley told you that on the week before the homicide, the defendant came to his home, and he told you that at that time the defendant had this knife with him.[13]
>
> And he told you that the defendant took this knife out of his coat and made statements to Lisa and George about how he knew how to knife fight. He knew how to hit the vital organs of the body. He was training in martial arts in knife fighting.
>
> Why do you suppose he did that? The Friday before Lisa was killed, the defendant was

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[13] "[T]his knife" refers not to the weapon used to kill Lisa Stanley, but to a knife found in Hogan's garage and identified by George Stanley as the knife Hogan brought to the Stanley apartment on January 22, 1988. Over defendant's objection, the knife was introduced as evidence at trial.

there at their home with that knife and exhibited it to Lisa and George both.

And George told you after the defendant left, Lisa was concerned. She said, I don't want him over here any more when you're not here.

She was concerned and she was worried.

MS. CLOWDUS [Defense]: Objection. This is not the evidence, your honor.

THE COURT: The jury will make the determination of what they heard.

MS. STENSAAS: If I misstate any evidence that you've heard, please remember it the way you recall it. . . . [14]

The defendant told them that he knew how to knife fight. He knew how to hit the vital organs. And he asked George what his specific work hours were. Now why do you suppose he did that?

Use your common sense. He comes with a knife on a day when he doesn't expect George to be there. He's surprised. He wants George to tell him, when are your work hours. Then, on the night of January 28, 1988, George Stanley comes home and finds his wife of less than two years dead on the floor.

(TR. 1082-83 (emphasis added by Petitioner)) During rebuttal, the prosecution offered the following:

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[14] Petitioner omits the italicized language from his Petition. Given the context of the statements and the legal requirement that the alleged misconduct not be viewed in isolation, the Court finds this information relevant to the discussion of this issue, and therefore includes it here.

> MR. MACY [Prosecutor]: In January, 1988, the defendant made some kind of agreement to move out of state on another job. He decided he was going to go by and see Lisa. *He went by on the wrong night. George was home.*
>
> *He brandished that knife for some reason. He told them how good he was with it. Found out exactly what hours George worked.* And on Thursday, January the 28th, 1988 he told his wife that he was going to work down south of Purcell.[15]
>
> He went to that apartment. *Lisa was still a little apprehensive after his visit on the previous Friday which would be natural.*

(TR. 1128 (emphasis added by Petitioner)). Petitioner contends these comments by the prosecution argued facts not in evidence. When the defense objected at trial, the court admonished the attorneys and the jury that the jurors would decide what the evidence was. Furthermore, the instructions to the jury at the end of the guilt/innocence phase instructed the jury that "[e]vidence is the testimony received from the witnesses under oath, stipulations made by the attorneys, and the exhibits admitted into evidence during the trial." (O.R. 152).

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[15] Petitioner argues "[t]here is certainly no evidence that he [Hogan] brought his hunting knife or any other weapon with him when he came to visit Lisa on January 28." [Petition at 47]. The Court believes Petitioner is misconstruing the argument offered by the prosecution. George Stanley testified that on January 22, 1988, Hogan came to his apartment and during his visit brandished a knife. This is the knife referred to. The Court does not interpret the quoted language as asserting that Hogan brought a knife when he visited Lisa on January 28, 1988.

On direct appeal, the Oklahoma Court of Criminal Appeals found no error in any of the allegedly prejudicial comments from stage one, the guilt/innocence stage. This Court agrees. The prosecution's theory throughout the case was that Hogan intended to harm Lisa Stanley on January 22, 1988, and was surprised to find George Stanley at home. The facts establish that George Stanley was not normally home at that time. George Stanley testified that Lisa indicated fear of Hogan after he departed on January 22, 1988. It is undisputed Hogan returned on January 28, 1988, and Lisa Stanley was alone. It is also undisputed that she was killed during this visit. To the extent that the prosecution's comments can be construed as arguing facts not in evidence, the trial judge issued appropriate curative instruction. Habeas relief is denied on this basis.

B. The Prosecution Misstated the Law

> MR MACY: What he was in the past unfortunately has no bearing on what he is today, and we've got to deal with what we've got today. And what we've got today is a man who can do what's shown in those pictures up there.
>
> You stop and think about it. Is the fact that during your childhood you've been a nice person, does that mitigate the fact – does that mitigate this kind of homicide? Does that in any way lessen what he did? What difference does it make what he was been in the past if he's capable of that today? . . .
>
> Twenty pages of these kinds of things about him being a good boy as he was growing up in

> no way mitigates what happened in a matter of a few minutes on January 28, 1988. No way.

(TR. 1270-71). Petitioner contends these comments misstate the law, as they unfairly characterize his mitigation evidence.

Argument about the strength of mitigation evidence and its weight relative to the evidence supporting the alleged aggravators is not improper. The jury is called upon to weigh the evidence, and it is permissible for the prosecution to argue its evidence outweighs the defendant's. Additionally, the statements were made in rebuttal of the argument presented by the defense, and therefore are invited remarks. *See Darden v. Wainwright*, 477 U.S. 168, 182 (1986); *Young*, 470 U.S. at 13. The Court finds no basis for holding that these comments mischaracterize the mitigation evidence offered in support of Hogan's position.[16] Hogan presented evidence that he

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[16] The jury instructions included the following:

> Evidence has been offered as (sic) the following mitigating circumstances:
>
> 1. The Defendant was a respectful and obedient child during his growing up years at home.
>
> 2. The Defendant helped at home with younger sister and was good brother.
>
> 3. The Defendant has been a kind, attentive and loving father to his two young sons.
>
> 4. The Defendant has helped others by expending both his time and money to help friends and family.
>
> 5. The Defendant has been a kind and attentive caretaker to other children left in his care.

was a well behaved child and hat [sic] he was helpful to his younger sister. The prosecution was arguing that despite being a good person in the past, a person might nevertheless be dangerous.

Considering these comments in the course of trial, offered as rebuttal, the Court cannot find that the comments rendered the trial fundamentally unfair. Habeas relief is denied on this basis.

Petitioner also complains about the following argument offered by the prosecution:

> MR MACY: Lisa Renee Stanley was killed in my county. . . . And I have a responsibility. My responsibility is to see to it that her killer is

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6. The Defendant has been in stressful situations and or confrontations in both his family and personal life and not reacted in a violent manner.

7. The Defendant volunteered and has assisted the Chaplain of the jail in ministering to the inmates spiritually.

8. The Defendant has acted to protect his sister from the actions of others, but did not act in a violent manner.

9. The Defendant has, since his childhood been active in his church and has maintained this spiritual aspect of his life. He and Lisa Stanley first became friends through church.

10. The Defendant was a good friend who was "like a brother" to Lisa Stanley, by her own words to others.

11. The Defendant has no prior criminal convictions.

(O.R. 168-69).

> brought before the bar of justice and that justice is dispensed. I'm going to do my job.

(TR. 1261).

> MR MACY: Before we put you in that box, before I could ask you what I'm asking you to do, the law requires that I lay before you evidence upon which you could base a verdict. Before I can do that, the District Attorney of this county had to make the decision to file a bill of particulars requesting the death penalty as you've seen.
>
> Before I could do that, the Oklahoma City Police Department had to investigate this crime and bring forth evidence and lay it before me upon which I could base my decision. You are here in the jury box today because it's your duty to be here. I'm here as a prosecutor and the Oklahoma City Police Department is here doing what they do in their cases because its their responsibility and their duty.
>
> I know your job is hard, but I believe in you. I know you can do it. Ms. Stensaas and I, when I sit down, we've done all we can do. The police department has done all they can do. The rest is up to you. We can't do it without you.

(TR. 1271-72). Petitioner argues these comments were improper as they led the jury to believe the responsibility for imposing a death sentence rested elsewhere. Petitioner contends "[i]n effect, the prosecutor's statement that the jury should do its 'job' has 'no place in the administration of justice.' " (Petition at 51 (quoting *Young*, 470 U.S. at 6, 8-9). Petitioner believes the statement erroneously led the jury to believe responsibility for any death sentence rested on "the law".

Review of the statements of the prosecution indicates only that the decision of whether to sentence Hogan to death was squarely in the jury's hands. Mr. Macy in no way informed the jury that it was anyone else's decision or role to sentence Hogan. "[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell v. Mississippi*, 472 U.S. 320, 328 (1985). In *Caldwell*, the prosecutor improperly argued to the jury that any decision they made in regard to a sentence of death was subject to appellate review.

This case is similar to *Dutton v. Brown*, 812 F.2d 593, 596 (10th Cir.), *cert. denied*, 484 U.S. 836, *and cert. denied*, 484 U.S. 870 (1987):

> The statement was not designed to, nor did it, suggest to the jury that it was not ultimately responsible for deciding Mr. Dutton's punishment. The prosecutor merely underscored that the jury was part of the whole system of justice, and within that system it had a grave responsibility. Indeed, the tenor of the remainder of the closing was that the crucial determination of punishment was the sole function of the jury. Thus, we hold that no prejudice resulted to the petitioner as a result of this comment.

In the instant case, nothing in the argument indicates that anyone but the jury was responsible.

Careful reading of the closing argument reveals a description for the jury of the roles played by the prosecution, the police, and the jurors in determining whether

the death penalty was an appropriate punishment for Mr. Hogan. The prosecution aptly informed the jurors that they were the only persons who could decide to impose a death sentence. Petitioner's argument that "[i]n effect, the prosecution argued the jury had a duty to convict" is without any merit, given that the above statements were made during the **second** phase, the penalty phase. Because the prosecution's comments were not improper, there is not basis for habeas relief in the above statements.

C. The Prosecution Improperly Attempted to Elicit Sympathy for the Victims

> MR. MACY: I'm not telling you that may have been perfectly right because he could have thought about it a week later. But I'm telling you I've got two daughters – if I walked in an [sic] found one of them dead –
>
> *MS. CLOWDUS: Object to this from the District Attorney, Your Honor. Not relevant.*
>
> *THE COURT: Make your argument*
>
> MR. MACY: You decide. What would you do if you walked in and found your wife there? Would you be thinking real clear? Maybe you would make a mistake.
>
> *There's nothing to rebut the fact that she had the knife. I'll talk about that.* He said in the twinkling of an eye she was stabbed. God, I wish it were in the twinkling of an eye instead of what it was.

(TR. 1123). Petitioner contends these comments during rebuttal closing argument of the guilt/innocence phase were improper because they called for sympathy for the

victim and her family. Respondent argues these statements were based on the record and were invited by the defense.

"[I]f the prosecutor's remarks were 'invited' and did no more than respond substantially in order to 'right the scale,' such comments would not warrant reversing a conviction." *Young*, 470 U.S. at 12 (internal citations omitted). As noted above, the Oklahoma Court of Criminal Appeals found no error in the comments during the first stage.

The comments by the prosecution responded to Hogan's argument about George Stanley's actions after he found Lisa Stanley dead in their apartment. Defense counsel argued: "But let's think about what happened. George Stanley comes home and before he calls the police and ambulance, anyone else, he starts looking for dope in his house. And he doesn't look in just one place even though he left it in one place, he looks several places." (TR. 1103-04). Hogan invited remarks about George Stanley's actions after finding his wife dead in their apartment by attempting to shift blame to George Stanley. The prosecutions' comment that finding his wife dead in the apartment might have affected George Stanley's judgment did not did not [sic] deprive Hogan of his constitutional rights and habeas relief is denied on this basis.

The comment about the "twinkle of an eye" was also invited by defense counsel. During his closing argument for Hogan, counsel argued on his behalf that "[i]n a twinkling of an eye that stabbing takes place." [TR. 1109].

The prosecution's rebuttal merely addressed the defendant's argument that the incident occurred in mere seconds. Nothing in the statement deprived [sic] rendered the trial fundamentally unfair, and habeas relief is denied on this basis.

Petitioner also objects to the characterization of Lisa Stanley as "little girl." However, as noted by the Court of Criminal Appeals, Lisa Stanley was a small woman, and Hogan was larger than she. Additionally, Hogan's counsel, in closing argument, noted that she was small. The Oklahoma Court of Criminal Appeals was not unreasonable in its determination that the comments about the victim's size were not improper.

D. The Prosecution Disparaged Hogan's Mitigation Evidence

Hogan also contends the prosecution violated his constitutional rights in the closing argument by disparaging his mitigation evidence

> MR MACY: He (defense counsel) said, well, this boy is just twenty-six years old. I'll tell you something . . . next year he'll be twenty-seven but Lisa will be twenty-one forever.
>
> [Objection and motion for mistrial overruled.]
>
> MR. MACY: He objected because we put in other evidence –
>
> [Objection overruled.]
>
> MR MACY: He objected in his closing argument – to the fact, that we were not too nice about his client. And yet he wants to be able to

> put on what a good boy he is. . . . He says this is the first violent crime. That's right. This is the first one, but let me tell you something, ladies and gentlemen. Once is enough. *Does it take two like this*? [Objection, request for admonishment and motion for mistrial, denied.]

(TR. 1264-65 (emphasis added by Petitioner)).

> What he was in the part [sic] unfortunately has no bearing on what he is today, and we've got to deal with what we've got today . . . What difference does it make what he has been in the past if he's capable of that today.

(TR. 1271).

Petitioner contends that these comments were inappropriate because they disparaged the mitigating evidence presented on his behalf. Petitioner contends that it was a violation of his Eighth Amendment rights for the prosecution to urge the jury to ignore the offered mitigating evidence.

The Court first notes that in order for the prosecution to prevail, the jury had to find that the aggravators outweighed any mitigating evidence. Therefore, the prosecution had to argue their evidence was stronger than the mitigating evidence, logically requiring comparison of the evidence. The jury was not precluded from considering any mitigating factors by virtue of the prosecution's argument. The cases cited by Petitioner do not aid his cause, as in those cases the jurors were prohibited from receiving evidence of certain mitigating factors. In none of those cases did the court consider whether it was appropriate for the prosecution to argue that the evidence of aggravators outweighed the mitigation evidence.

The Oklahoma Court of Criminal Appeals considered the alleged misconduct in light of Hogan's confession to the killing, and found, rightly so, that the alleged errors did not deprive Hogan of his constitutional rights. This Court cannot say that the Oklahoma Court of Criminal Appeals erred or that it was unreasonable in its finding with regard to alleged prosecutorial misconduct. Therefore, the petition is denied on this basis.

VI. The Trial Court Erred in Allowing Introduction of a Knife That Was Not the Murder Weapon

Hogan argues the trial court erred in permitting the admission into evidence a knife that was not the weapon used to kill Lisa Stanley. The issue was raised for the first time during state post-conviction proceedings. The Oklahoma Court of Criminal Appeals refused to consider the issue, finding Hogan waived his right by failing to raise the issue on direct appeal. In an effort to overcome the procedural bar, Petitioner argues his appellate counsel provided ineffective assistance because they failed to raise this issue on direct appeal.

A state evidentiary claim does not provide the basis for habeas corpus relief unless the error "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Romano v. Oklahoma*, 512 U.S. 1, 12 (1994). At trial George Stanley testified that on January 22, 1988, Hogan visited the Stanley home. During this visit, Hogan exhibited a hunting knife and told the Stanleys of his knowledge of martial arts. The prosecution's theory of the case was that on January 22, 1988, Hogan visited the Stanley home during George's normal work

hours. However, a visit to the doctor with his wif Lisa, kept George away from work that day. Hogan asked George about his normal work schedule. It was during this visit that Hogan exhibited the knife. The prosecution theorized Hogan was surprised to find George home and intended to use the knife against Lisa Stanley. The knife was found in Hogan's garage during a search of his home.

Petitioner contends the knife was prejudicial because it allowed prosecutors to argue an unsupported theory of events. The evidence at trial, however, supported the inference that prosecutors sought to prove as true. Furthermore, assuming *arguendo* that admitting the knife was error, the Court cannot find that the exhibit rendered the trial fundamentally unfair. The knife was not wholly unrelated to the events at hand. If the trial court had allowed a random knife to be introduced into evidence, the Court would perhaps give greater weight to Hogan's argument. However, given the testimony of George Stanley regarding the events on January 22, 1988, the Court cannot find that Hogan's trial was rendered fundamentally unfair by the introduction of the knife. Therefore, Hogan was not prejudiced by counsel's failure to raise the issue on direct appeal. Because Petitioner cannot establish prejudice arising from counsel's conduct, his claim is subject to the procedural bar and habeas relief is inappropriate.

Petitioner also presents a brief argument that the state's failure to follow Oklahoma law implicated a liberty interest protected by the due process clause. (Petition at 60). However, Petitioner fails to argue to the Court what liberty interest was allegedly violated. The Court is

unaware of any authority that removes the trial judge's discretion with regard to evidentiary matters. This argument does not provide a basis for habeas corpus relief.

VII. Life Without Parole

Petitioner contends his counsel erred in failing to argue on direct appeal that the trial court erred in failing to define for the jury the term "life without parole." Petitioner first raised the issue during state post-conviction relief proceedings. The Oklahoma Court of Criminal Appeals held that Petitioner waived the issue by failing to raise it on direct appeal. However, the court addressed whether an intervening change in the law, *Simmons v. South Carolina*, 512 U.S. 154 (1994), applied to Petitioner's case. Because the Court of Criminal Appeals examined the merits of this claim with regard to *Simmons*, the Court cannot conclude the issue is subject to the procedural bar. The Court must address this claim on its merits.

The trial court instructed the jury during sentencing that it could impose a sentence of life, life without parole, or death.

> The Defendant in this case has been found guilty by you, the jury, of the offense of Murder in the First Degree. It is not your duty to determine the penalty to be imposed for this offense. Under the laws of the State of Oklahoma, every person found guilty of Murder in the First Degree shall be punished by death or imprisonment for life or imprisonment for life without parole.

(O.R. 160). During deliberations on Hogan's sentence the jury sent out a note: "Do not understand 'Life without

parole' Could you please define 'life without parole?' " The judge responded with a note: "You have all the law in this case the Court is authorized to give you." Petitioner contends his due process rights under the Fourteenth Amendment were violated by the court's failure to allow him to inform the jury he would not be eligible for parole if sentenced to life without parole.

In *Simmons* the Supreme Court analyzed South Carolina law, and found its instruction on sentences of life or death, without allowing evidence of a defendant's statutory ineligibility for parole, was erroneous. The Oklahoma Court of Criminal Appeals held, in light of *Simmons*, that where a jury is instructed on life without the possibility of parole, no other instruction regarding the definition of life is necessary. *Hain v. State*, 919 P.2d 1130, 1143 (Okla. Crim. App.), *cert. denied*, ___ U.S. ___, 117 S.Ct. 588 (1996). In the instant case, the jury was instructed on death, life, and life imprisonment without the possibility of parole. The Supreme Court implied where a jury is instructed no life without the possibility of parole, no additional definition of life imprisonment is required. *Simmons*, 512 U.S. at 2197.

Courts that have contemplated extending *Simmons* have rejected requests to do so. "[*Simmons*] only holds more narrowly that '[w]hen the state puts the defendant's future dangerousness in issue, and the *only* available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury – either by argument or instruction – that he is parole ineligible." *Townes v. Murray*, 68 F.3d 840, 850 (4th Cir. 1995) (quoting *Simmons*, 512 U.S. at 178 (O'Connor, J)), *cert. denied*, 516 U.S. 1100 (1996)

(emphasis added). The facts of the instant case, like those in *Townes*, do not fall within the narrow rule created by *Simmons*. *See also, Montoya v. Scott*, 65 F.3d 405, 416 (5th Cir. 1995), *cert. denied*, 502 U.S. 961 (1996) (*Simmons* not to be extended beyond situations in which a defendant is statutorily ineligible for parole); *Allridge v. Scott*, 41 F.3d 213 (5th Cir. 1994), *cert. denied*, 514 U.S. 1108 (1995); *Kinnamon v. Scott*, 40 F.3d 731 (5th Cir.), *cert. denied*, 513 U.S. 1054 (1994). Here, Hogan was not statutorily ineligible for parole; but rather, the jury was entitled to determine whether he was so eligible. *Simmons*, 114 S.Ct. at 2187, n. 7 (eight states, including Oklahoma, allow the jury to specify whether the defendant should or should not be eligible for parole).

In *Feltrop v. Delo*, 46 F.3d 766 (8th Cir. 1995), *cert. granted judgment vacated on other grounds*, ___ U.S. ___, 116 S.Ct. 559 (1995), the court instructed the jury the defendant could be sentenced to death or imprisonment for life without eligibility for parole or probation. *Id.* at 771. Feltrop alleged a violation of *Simmons*, because the trial judge refused to answer the jury's inquiry:

> Is there any legal situation under which a person can be released who has received life without parole: that is pardoned by the governor. Please distinguish between life in prison and natural life. Are these one in [sic] the same? What is the length of life, capital life?

Id. The Eighth Circuit, in denying habeas relief, noted that the trial court's initial instruction was "sufficiently clear that its refusal to further explain the phrase, imprisonment for life without eligibility for probation or parole, was not 'a fundamental defect that resulted in a

complete miscarriage of justice or so infected the entire trial as to deprive the defendant of a fair trial.' " *Id.* at 772 (quoting *Baker v. Leapley*, 965 F.2d 657, 659 (8th Cir. 1992) (quotation omitted)).

This Court agrees with the *Feltrop* court, as well as with the other cases cited herein. *Simmons* does not aid Petitioner in his quest for habeas relief. This decision, however, does not terminate the Court's inquiry on this issue. Hogan alternatively argues that the trial court's failure to clarify the meaning of life without parole violated his Eighth Amendment rights. The Supreme Court in *Simmons* specifically did not address this issue. *Simmons*, 512 U.S. at 162 n. 4. ("We express no opinion on the question whether the result we reach today is also compelled by the Eighth Amendment"). Petitioner contends, however, that because the trial judge did not inform the court accurately about its sentencing options, the reliability of the jury's determination was undermined.

The argument asserted by Hogan is similar to that raised by the petitioner in *Townes*, 68 F.3d at 851. In resolving the issue, the court held that because of the potential tension between Supreme Court cases, that it could not find that "Eighth Amendment jurisprudence existing at the time [petitioner's] conviction became final made clear that a jury's decision to impose the death penalty despite their uncertainty regarding whether the defendant would be eligible for parole if sentenced instead to life imprisonment would have amounted to cruel and unusual punishment." *Id.* The court continued on by discussing whether the rule sought by the petitioner was a "new" rule, and therefore subject to the

limitations of *Teague v. Lane*, 489 U.S. 288, 307 (1989) (plurality opinion).[17]

The court found that the rule Townes sought was new, and that it did not fit into ether of the *Teague* exceptions. This Court agrees. The Court is unable to find in Supreme Court precedent the rule Petitioner seeks to have applied to his case. Although Petitioner cites to general pronouncements regarding Eighth Amendment rights, the Court finds nothing in these cases to support his specific claim. Absent authority compelling or suggesting the result sought by Hogan, the Court denies habeas relief on this basis.

VIII. Failure to Challenge Heather Murphy's Testimony

During state post-conviction proceedings, Hogan first argued the trial court erred in admitting the hearsay statements of Heather Murphy, a child. The Oklahoma Court of Criminal Appeals reviewed the claim only for purposes of determining whether trial counsel was ineffective for failing to seek an *in camera* hearing or whether

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[17] Pursuant to the doctrine of *Teague*, a "new" rule of constitutional law is not applied to those persons whose convictions become final prior to the rule's pronouncement, unless one of two exceptions applies. The first exception applies if the new rule places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague*, 489 U.S. at 307. The second exception permits application of a new rule if the rule would "implicate the fundamental fairness" of the criminal proceedings. *Id.* Neither of these exceptions is implicated in the instant case. *See Townes*, 68 F.3d at 852-53.

appellate counsel was ineffective for failing to raise the issue on direct appeal. The court denied relief. In support of the aggravator that Petitioner constituted a continuing threat to society, the prosecution presented the following evidence.

While examining Dennis Stewart, a police detective for the City of Moore, the prosecution asked if he knew Heather Murphy. Stewart stated that he did, having met her when she was eleven years old, in the course of an investigation involving Hogan. He testified that in her statement to police, Heather Murphy said that "she was at Ken Hogan's house, and she was in the bedroom of the residence when Ken Hogan came up behind her and placed his hand on her breast under her swimsuit." (TR. 1188). Defense counsel objected to the question, but did not request an *in camera* hearing on the issue.

As noted by the Oklahoma Court of Criminal Appeals on review of the denial of Petitioner's request for habeas relief, "[w]hile it may have been better if the hearing would have been held, any error is harmless to Hogan as the jury did not find the aggravator sought to be proven by Heather's testimony." (Order affirming denial of post-conviction relief at 5). This Court agrees. In order to prevail against Respondent's procedural bar argument, Petitioner must establish that he was prejudiced by counsel's failure to request an *in camera* hearing or by appellate counsel's failure to raise the issue on direct appeal. Because the jury did not find the "continuing threat" aggravator, the Court can find no prejudice

stemming from counsel's handling of the testimony of Heather Murphy.[18]

IX. Failure to Challenge the Constitutionality of Heinous Atrocious or Cruel Aggravator

In his petition for rehearing following the denial of his direct appeal, Hogan first challenged the constitutionality of the "heinous, atrocious, or cruel" aggravator used to support his death sentence. The Oklahoma Court of Criminal Appeals did not consider the merits of the claim. On post-conviction relief, the Court of Criminal Appeals held that Hogan had waived the issue by failing to raise it on direct appeal.

The jury instructions during the sentencing phase included the following:

> As used in these instructions, the term "heinous" means extremely wicked or shockingly evil; "atrocious" means outrageously wicked and vile; "cruel" means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others.
>
> The phrase "especially heinous, atrocious, or cruel" is directed to those crimes where the death of the victim was preceded by torture of the victim or serious physical abuse.

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[18] Additionally, the Court notes that an admission by the Petitioner that he engaged in such conduct was presented to the jurors; further undercutting any assertion of prejudice allegedly stemming from the hearsay testimony. (TR. 1191).

(OR 164). Petitioner is correct in noting that the first paragraph of this instruction was determined unconstitutionally vague by the United States Supreme Court in *Maynard v. Cartwright*, 486 U.S. 356 (1988). However, "a court may cure an unconstitutional vague aggravator . . . by adopting a narrowing construction." *Hatch v. State*, 58 F.3d 1447, 1468 (10th Cir. 1995) (citing *Richmond v. Lewis*, 506 U.S. 40, 46-47 (1992)), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1881 (1996). Furthermore, in response to *Maynard*, Oklahoma adopted a "limited construction mandating that the murder involve 'torture of the victim or serious physical abuse.' " *Id.* at 1468 (quoting *Stouffer v. Oklahoma*, 742 P.2d 562, 563 (Okla.Crim.App. 1987), *cert. denied*, 484 U.S. 1036, 108 S.Ct. 763, 98 L.Ed.2d 779 (1988)).

Petitioner nevertheless argues that "directed to" as used in the second paragraph is ambiguous, and therefore, jurors cannot be expected to understand that only cases involving torture or serious physical abuse warrant use of the aggravator. (Petition at 74). The Court does not find "directed to" is an ambiguous term. In *Nuckols v. Reynolds*, 970 F.Supp. 885 (W.D.Okla. 1993), *appeal dismissed*, 70 F.3d 123 (10th Cir. 1995), the Court considered whether the addition of the second paragraph quoted above was sufficient to overcome the vagueness problem noted in *Maynard*.

> Upon review of [the HAC instruction] in its entirely, the Court finds a jury, after consideration of [the] Instruction . . . is sufficiently enabled "to make a principled distinction between those who deserve the death penalty and those who do not." [*Lewis v. Jeffers*, 497 U.S. 764,] 776, 110 S.Ct. at 3099 (citations omitted). [The] Instruction . . . , as a whole, genuinely

> narrows the class or person "eligible" in Oklahoma for the death penalty and provides reasonable justification for the imposition by a jury of such a sentence on a defendant.

Nuckols, 970 F.Supp. at 891 (footnotes omitted); *see also Walton v. Arizona*, 497 U.S 639, 110 S.Ct. 3047, 111 L.Ed.2d 511, 529 (1990); *Duvall*, ___ F.3d at ___, 1998 WL 97748, *25 ("[t]he [HAC] aggravator is not unconstitutional on its face . . . ").

This Court agrees with *Duvall* and *Nuckols* and the determinations set forth therein. Accordingly, for the reasons set forth above, the Court finds that Hogan's Eighth and Fourteenth Amendment rights were not violated by use of the instruction on the heinous, atrocious, or cruel aggravator. Although appellate counsel did not raise this issue on direct appeal, Petitioner was not prejudiced by this failure and this claim is therefore barred.

X. Failure to Challenge the Prosecutor's Lack of Notice regarding the Second Stage Evidence

In his application for post-conviction relief, Hogan argued, for the first time, that his rights under the Sixth, Eighth and Fourteenth Amendments were violated because the State failed to give him timely notice of the evidence it would use against him during sentencing proceedings. He further contends that the statements finally provided to him were insufficient, because they did not list all of the witnesses eventually called and did not specify what evidence was anticipated. Notably, trial counsel did not object that the timing of these filings prevented the adequate preparation of Hogan's case. The

Oklahoma Court of Criminal Appeals held the issue defaulted because it was not raised on direct appeal. Hogan contends it was appellate counsel's ineffectiveness that caused the default of this claim.

Petitioner received the State's Bill of Particulars on September 13, 1998 for an October 11, 1988 trial date. The Bill alleged three aggravating circumstances in support of the death penalty: (1) Renee Stanley's killing was heinous, atrocious and cruel; (2) there was a probability that Hogan would commit additional criminal acts of violence, such that he constituted a threat to society; and (3) Renee Stanley was killed by Hogan in order to avoid or prevent a lawful arrest or prosecution. (OR 39-40). On October 5, 1988, six days before trial, the State filed a Statement to Make More Definite and Certain, outlining the evidence to be presented in support of the aggravators.[19] On October 6, 1988, the State filed its proposed witnesses for stage two of the trial, listing twenty potential witnesses. Petitioner alleges certain witnesses were not listed in certain places, and one witness never appeared on any list prior to trial.[20] Petitioner, however, fails to inform the Court just who these witnesses were,

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[19] In support of the heinous, atrocious, or cruel aggravator, the State indicated that it would rely on the testimony of Dr. Chai Choi presented during the conviction phase of trial. Again, this was the only aggravator the jury found to support the death sentence. Therefore, the Court will not reiterate the witnesses that the State listed in support of the aggravators.

[20] The Court reviewed the transcript of the State's witnesses on direct and compared the names of those persons called with those listed. After completing such review, the Court is unable to discern who the "surprise" witness was.

apparently expecting the Court to reconstruct the entire trial and to compare the listed witnesses with those who testified. Given the fact that the jury found evidence to support only one aggravator, this is not required.[21]

The majority of the evidence in support of the heinous, atrocious, or cruel aggravator was presented during the first stage of the trial. Some pictures of the scene were introduced during the second stage proceedings, however Hogan does not challenge the pictures. Indeed, all of this evidence should have been anticipated throughout the preparation of the defense. Plaintiff has made no showing of prejudice stemming from counsel's failure to object to the timing and contents of the Bill of Particulars and the State's second stage witness lists.

"[T]he United States Supreme Court has held that denial of a defendant's opportunity to meaningfully deny or explain evidence used to procure a death sentence is a denial of due process." *Williamson v. Reynolds*, 904 F.Supp. 1529, 1569 (E.D.Okla. 1995) (citing *Gardner v. Florida*, 430 U.S. 349, 362, 97 S.Ct. 1197, 1207, 51 L.Ed.2d 393 (1977)), *aff'd*, 110 F.3d 1508 (10th Cir. 1997), *overruled on other grounds by, Nguyen v. Reynolds*, 131 F.3d 1340 (10th Cir. 1997). Petitioner fails to establish that prejudicial witnesses were used to procure a death sentence, given that

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[21] Petitioner also contends that because the witness list contained twenty names, but only two of these persons were ever called, that the State was obviously attempting to camouflage its true intent. Petitioner, however, fails to point the Court to any authority to support his theory and disclosing witnesses, but not calling them, is a violation of a defendant's constitutional rights.

the evidence to support the HAC aggravator was presented only in the first stage and through pictures entered into evidence in the second stage. It is Petitioner's burden to establish prejudice and because he has failed to establish any, he is barred from raising this issue.

XI. Various Sentencing Instructions

In his petition seeking post-conviction relief in state court, Hogan argued for the first time that numerous sentencing instructions constituted fundamental error. The Court of Criminal Appeals held the substantive claims waived because they were not raised on direct appeal. The Oklahoma Court of Criminal Appeals reviewed the issue to determine whether appellate counsel was ineffective for failing to raise the issue. The court found counsel was not ineffective.

A. Presumption of Life

Petitioner claims the trial court erred in failing to instruct the jury that he was presumed to be entitled to a life sentence as opposed to the death penalty, the so-called "presumption of life." Hogan claims that a "presumption of life" instruction is akin to the presumption of innocence instruction given in criminal trials. According to Petitioner, because a jury must be instructed as to the presumption of innocence attributed to every defendant during the guilt/innocence phase of a trial, so must a jury be instructed during sentencing.

This claim has been repeatedly rejected by the Oklahoma Court of Criminal Appeals. *Boyd v. State*, 839 P.2d 1363, 1372, (Okla. Crim. App. 1992), *cert. denied*, 509 U.S. 908 (1993); *Duvall v. State*, 825 P.2d 621, 633-34 (Okla. Crim. App. 1991), *cert. denied*, 506 U.S. 878 (1992); *Battenfield v. State*, 816 P.2d 555, 564 (Okla. Crim. App. 1991), *cert. denied*, 503 U.S. 943 (1992). Given the Oklahoma Court of Criminal Appeals position on this issue, the Court cannot find that Petitioner was prejudiced when counsel failed to raise the issue.

Petitioner also argues the trial court's sentencing instructions were erroneous because the court failed to instruct jurors that regardless of whether the aggravating circumstances outweighed the mitigating circumstances, they could nevertheless impose a life sentence.[22] Petitioner bases his argument in part on *Moore v. Kemp*, 809 F.2d 702, 730-33 (11th Cir.), *cert. denied*, 481 U.S. 1054 (1987). In *Moore*, the court found that the instructions during the sentencing phase did not inform the jury of the option of returning a life sentence despite finding the existence of an aggravating circumstance. However, the decision was premised upon the particular language in one sentence of the instructions, informing the jury that the mere existence of an aggravator required a sentence of death. This decision was explained in *Moore v. Butler*, 819 F.2d 517 (5th Cir.), *cert. denied*, 482 U.S. 920 (1987),

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[22] In Oklahoma, a jury is free to impose a sentence other than death even if it finds the aggravating circumstances outweigh the mitigating. *Duvall*, ___ F.3d at ___, 1998 WL 97748, *20 (citing *Burrows v. Oklahoma*, 640 P.2d 533, 544 (Okla. Crim. App. 1982), *cert. denied*, 460 U.S. 1011 (1983)).

where, as in the instant case, the instructions did not contain mandatory language.

> The jury instruction at issue in [*Moore v. Kemp*] . . . , which was held to be "contradictory and confusing as to the jury's function if it determined that an aggravating circumstance was present," *Id.* at 733, contained, *inter alia*, an instruction that if an aggravating circumstance was found, "the form of your verdict would be . . . death." *Id.* The instruction at issue in this case [which did not require such a result] is not similarly infirm.

Id. at 521.

The instructions to the jury in Petitioner's case included the following:

> Aggravating circumstances are those which increase the guilt or enormity of the offense. In determining which sentence you may impose in this case, you may consider only those aggravating circumstances set forth in these instructions.
>
> Should you unanimously find that one or more aggravating circumstances existed beyond a reasonable doubt, you would be authorized to consider imposing a sentence of death. . . .

(O.R. 165). The instruction given in the instant case did not prevent the jury from returning a life sentence and adequately informed the jury of its options. The Court of Criminal Appeals, often presented with Hogan's argument, has rejected it, as has the Tenth Circuit Court of Appeals. *See Valdez v. State*, 900 P.2d 363, 385 (Okla. Crim. App.), *cert. denied*, 116 S.Ct. 425 (1995); *Bryson v. State*, 876 P.2d 240, 262-63 (Okla. Crim. App. 1994), *cert. denied*, 513

U.S. 1090 (1995); *Duvall*, ___ F.3d at ___, 1998 WL 97748, *20-21. Here, the trial court informed the jury it was authorized, but not required to, impose a sentence of death upon unanimously finding the existence of an aggravator, if it outweighed any mitigating circumstances the jury found to exist. Therefore, Hogan was not prejudiced by appellate counsel's failure to raise the issue, and he is barred from presenting it here.

B. Weighing Instructions

Petitioner argues the weighing instruction given to the jury was confusing and inaccurate, and therefore unconstitutional. The jury was instructed as follows:

> If you unanimously find that one or more of the aggravating circumstances existed beyond a reasonable doubt, unless you also unanimously find that any such aggravating circumstance or circumstances outweigh the finding of one or more mitigating circumstances, the death penalty shall not be imposed.

(O.R. 169). Hogan contends this instruction fails to provide the jury with a method for conducting the required weighing, and apparently provides a simple preponderance of the evidence standard.

Oklahoma Stat. tit. 21 § 701.11 requires that a death sentence be supported by a unanimous finding of the existence of at least one statutory aggravating circumstance beyond a reasonable doubt. The statute also requires that any aggravating circumstance found to exist beyond a reasonable doubt must outweigh any mitigating factor(s). *Id.* However, "specific standards for balancing

aggravating circumstances against mitigating circumstances are not constitutionally required." *Allen v. State*, 871 P.2d 79 (Okla. Crim. App.) (citations omitted), *cert. denied*, 513 U.S. 952 (1994). *See also Zant v. Stephens*, 462 U.S. 862, 890 (1983).

> The State must prove beyond a reasonable doubt the existence of at least one of the enumerated aggravating circumstances. *Romano [v. State*, 847 P.2d 368, 392 (Okla. Crim. App. 1983)]. The determination of the weight to be accorded the aggravating and mitigating circumstances is not a fact which must be proved beyond a reasonable doubt. *Id.* instead, it is a balancing process. *Id.* The balancing test utilized has been consistently upheld by this Court, and is not unconstitutional.

Id. at 279. *See also, Duvall v. State*, 825 P.2d 621, 633 (Okla. Crim. App. 1991); *Johnson v. State*, 731 P.2d 993, 1004 (Okla. Crim. App.), *cert. denied*, 484 U.S. 878 (1987), *overruled on other grounds by, Green v. State*, 862 P.2d 1271 (Okla. Crim. App. 1993).

Hogan fails to present the Court with any authority to support his theory that the instruction violated his federal constitutional rights. Because the instruction did not improperly state the burden, and because the instruction was not confusing and misleading, counsel did not err in failing to raise the issue on appeal. The instructions did not preclude the jurors from giving full weight to any mitigating evidence presented by Hogan. Therefore, counsel's actions did not prejudice Petitioner such that he can overcome the procedural bar asserted by Respondent. Hogan is not entitled to habeas relief on this ground.

C. Mitigation Evidence Instructions

Hogan argues his jury was improperly instructed that it could ignore all mitigating evidence presented on his behalf during sentencing. Petitioner contends the following jury instruction violated his Eighth Amendment rights.

> Mitigating circumstances are those which, in fairness and mercy, *may* be considered as extenuating or reducing the degree of moral culpability or blame. The determination of what are mitigation circumstances is for you as jurors to resolve under the facts and circumstances of this case.

(O.R. 166 (emphasis added by Petitioner)).

The Oklahoma Court of Criminal Appeals addressed this issue in *Pickens v. State*, 850 P.2d 328 (Okla. Crim. App. 1993), *cert. denied*, 510 U.S. 1100 (1994), and rejected the claim, noting that when after reviewing the entirety of the second stage instructions, it was "clear the jury was not told to disregard any mitigation evidence." *Id.* at 339. The court further found that "it would be an inaccurate statement of the law to instruct the jury that it 'must' consider the mitigation evidence presented to reduce the blame as that would take way from the jury its individualized determination of the appropriate punishment." *Id.* at 339. *Accord Brown v. State*, 871 P.2d 56, 764 (Okla. Crim. App.), *cert. denied*, 513 U.S. 1003 (1994).

The analysis undertaken by the court in *Pickens* is sound. Petitioner's interpretation of the instruction is at

odds with a reasonable interpretation of what the language of the charge conveys: a legally proper definition of mitigating circumstances.

> [T]he State may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence. *Johnson v. Texas*, 509 U.S. 350, 362, 113 S.Ct. 2658, 2666, 125 L.Ed.2d 290 (1993); *Penry*, supra, at 326, 109 S.Ct., at 2951; *Franklin v. Lynaugh*, 487 U.S. 164, 181, 108 S.Ct. 2320, 2331, 101 L.Ed.2d 155 (1988). Our consistent concern has been that restrictions on the jury's sentencing determination not preclude the jury from being able to give effect to mitigating evidence. . . . [T]he standard for determining whether jury instructions satisfy these principles [i]s "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." [*Boyde v. California*, 494 U.S. 370,] at 380, 110 S.Ct., at 1198; *see also Johnson*, supra, at 367-368, 113 S.Ct., at 2669.

Buchanan v. Angelone, ___ U.S. ___, 118 S.Ct. 757, 761, ___ L.Ed.2d ___, ___ (1998). The instructions to the jury in Hogan's case did not run afoul of the standard set forth above. Because this claim lacks merit, appellate counsel's failure to assert it on direct appeal does not excuse Petitioner's procedural default. The issue is accordingly barred.

D. Oklahoma's Capital Sentencing Scheme

Petitioner further contends Oklahoma's capital sentencing scheme fails to permit meaningful appellate review of the jurors' sentencing determination because it does not require jurors to memorialize in writing their findings regarding mitigating circumstances.[23] The United States Court of Appeals for the Tenth Circuit has determined that so long as a state's sentencing scheme provides for some form of meaningful appellate review of a capital sentence, the mere failure of the scheme to require written findings by the jurors of the mitigating circumstances does not render the scheme constitutionally infirm. *Andrews v. Shulsen,* 802 F.2d 1256, 1261 (10th Cir. 1986), *cert. denied,* 485 U.S. 919 (1988) (citing *Jurek v. Texas,* 428 U.S. 262, 270-71, 96 S.Ct. 2950, 2955-56, 49 L.Ed.2d 929 (1976)). The Tenth Circuit Court of Appeals recently rejected this same argument in *Castro v. Ward,* ___ F.3d ___, 1998 WL 113193, *12 (10th Cir. 1998).

Oklahoma's capital sentencing scheme provides a statutory mechanism for meaningful appellate review of each capital sentence imposed in the State. *See* Okla. Stat. tit. 21 § 701.13(A). The statutory provision mandating appellate review includes a requirement that the Oklahoma Court of Criminal Appeals review the state court record *de novo. Id.* The review required by § 701.3(A) was

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[23] Jury Instruction 11 given during the sentencing phase included the following:

> The law does not require you to reduce to writing the mitigating circumstance you find, if any.

(OR 170).

conducted in the instant case, and the death sentence was affirmed. *Hogan*, 877 P.2d at 1163-64.

Because Oklahoma's capital sentencing scheme provided Hogan with meaningful appellate review of his sentence, and because such review was conducted, the Court holds that the mere failure of Oklahoma to require jurors to memorialize mitigating circumstances does not render Petitioner's sentence constitutionally infirm. Therefore, counsel's failure to raise the issue at trial or on appeal did not prejudice Hogan; and Petitioner is barred from raising this claim.

XII. OTHER CRIMES EVIDENCE

Petitioner also argues the trial court erred in failing to exclude evidence of other crimes, thereby prejudicing his defense and violating his right to a fair trial. Hogan raised this issue on direct appeal, and the Court of Appeals affirmed the conviction, finding the issue to be without merit. The court refused to review his request for relief during post-conviction proceedings based on the doctrine of *res judicata*.[24]

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[24] The Court notes that on direct appeal Petitioner challenged the state's alleged failure to comply with *Burks v. State*, 594 P.2d 711 (Okla.Crim.App. 1979), *overruled on other grounds by, Jones v. State*, 772 P.2d 922 (Okla. Crim. App. 1989), alleging he was given insufficient notice of the evidence. The court denied relief, noting that *Burks* is intended to avoid surprising a defendant by introduction of evidence of other crimes. Here, however, the evidence of other crimes was part of Hogan's statement to the police, during which time he confessed to killing Lisa Stanley. Accordingly, the court held, there was no surprise.

Petitioner complains about the information contained in the statement that he gave to police. He stated that on January 28, 1988, Lisa Stanley asked him to steal a stereo and VCR for her, and that he refused, because he already had burglary charges pending against him. He also feared that the victim would report to police that he had attempted to rape her, a story Hogan alleges Lisa Stanley fabricated.

> "[S]tate court rulings on the admissibility of evidence may not be questioned in federal habeas proceedings unless they render the trial so fundamentally unfair as to constitute a denial of federal constitutional rights." *Tucker v. Makowski*, 883 F.2d 887, 881 (10th Cir. 1989) (internal quotation marks and citations omitted). "[W]e will not disturb a state court's admission of prior crimes, wrongs or acts unless the probative value of the such [sic] evidence is so greatly outweighed by the prejudice flowing from its admission that the admission denies defendant due process of law." *Hopkinson v. Shillinger*, 886 F.2d 1185, 1197 (10th Cir. 1989).

Duvall, ___ F.3d ___, 1998 WL 97748, *17 (10th Cir. 1998). As noted by the Court of Criminal Appeals, the evidence was offered to establish Hogan's motive for killing Stanley. *Hogan*, 877 P.2d at 1162. Evidence of other bad acts is not admissible to establish a propensity to commit criminal acts. However, it is admissible to establish motive. The evidence presented at trial in the form of Hogan's statement established that the victim, Lisa Stanley, threatened to tell police that Hogan was involved in burglary, while awaiting trial on other burglary charges. This evidence of motive was not improperly introduced.

Additionally, contrary to Petitioner's assertions, a limiting instruction was given by the trial court.

> Evidence has been received that the Defendant has allegedly committed offenses other than that charged in the Information. You may not consider this evidence as in any way tending to prove the guilt or innocence of the Defendant of the specific offense charged in the Information. This evidence has been received solely on the issue of the Defendant's motive. This evidence is to be considered by you only for the limited purpose for which it was received.

(O.R. 149) The court of appeals did not err in its finding with regard to the admission of the evidence relating to other crimes.

Nor did the court err in finding that *Burks* does not provide Hogan with relief from the jury's verdict and sentence. *Burks'* notice requirement operates to prevent unfair surprise. Where, as here, the strongest evidence of a defendant's guilt is his statement to police, which also contains the evidence of prior crimes, claiming surprise is disingenuous. Petitioner fails to establish that the prosecution's failure to give notice of its intent to use the portion of his statement containing evidence of other crimes without specifically notifying him of such rendered his trial fundamentally unfair.

For the reasons stated herein, the admission of evidence of other crimes does not entitled [sic] Hogan to habeas relief.

X. INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner alleges five specific areas of ineffective assistance of trial counsel and six instances of ineffective assistance of appellate counsel. Claims of ineffective assistance of counsel are subject to the analysis set forth in *Strickland*.

To prevail on a claim of ineffective assistance of counsel Hogan must show his counsel

> " 'committed serious errors in light of prevailing professional norms" ' such that his legal representation fell below an objective standard of reasonableness." *Duvall v. Reynolds*, 131 F.3d 907, 916 (10th Cir. 1997) (quoting *United States v. Haddock*, 12 F.3d 950, 955 (10th Cir. 1993) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984))). [The Court] evaluate[s] counsel's conduct from the perspective of counsel at the time, not with "the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. Further, [Petitioner] must overcome the presumption that his counsel's conduct was constitutionally effective. *Duvall*, 131 F.3d at 916. If he establishes his counsel was ineffective, he must then show prejudice: " 'a "reasonable probability" that the outcome would have been different had those errors not occurred.' " *Id.* (quoting *Haddock*, 12 F.3d at 955 (quoting *Strickland*, 466 U.S. at 694))).

Castro v. State, ___ F.3d ___, 1998 WL 113193, *19 (10th Cir. 1998).

A. Trial Counsel

Hogan has five claims that trial counsel was ineffective: (1) failure to present mental health evidence; (2) failing to sufficiently investigate available mitigation evidence; (3) failing to allow him to testify at sentencing or to exercise his right of elocution; (4) failure to challenge the state's evidence, specifically the medical examiner's findings; (5) failing to request certain jury instructions and an *in camera* hearing on the hearsay testimony about Heather Murphy's statement.

1. Mental Health Evidence

Hogan first claims trial counsel should have introduced mental health evidence during the first and second stages of trial. Hogan was examined by a court appointed psychologist to determine whether he was competent to stand trial. He was also examined by two other psychologists, one for the state and one hired by his counsel. Counsel for the defense decided against using an insanity defense. Hogan argues, however, that the mental health evidence should have been used in conjunction with the self-defense theory and in support of his request for instructions on lesser included offenses.

Hogan raised this issue during state post-conviction proceedings. The Oklahoma Court of Criminal Appeals noted Hogan was examined by two psychologists during the initial trial. The court further noted the State made an offer of proof of Petitioner's violent nature, a conclusion drawn from the psychologist's report. Defense counsel objected, seeking to avoid the introduction of testimony

from the State's expert that, in his opinion, Hogan was very violent. The evidence was not presented by the State.[25] The Court of Criminal Appeals, in reviewing Hogan's ineffective assistance claim on this basis, found that counsel's decision to the claim was "based on a reasonable belief that the testimony of violence regarding Hogan would be more prejudicial than probative, and therefore not beneficial." (Order affirming denial of post-conviction relief at 4). The Court of Criminal Appeals concluded that Hogan failed to establish that "but for" his counsel's failure to present evidence of his mental health, that the outcome of the trial would have been different.

It is difficult for a petitioner to establish that counsel's performance fell below an objective standard of reasonableness, because the court will allow trial counsel extremely broad discretion in matters that "might be considered sound trial strategy." *Breechen v. Reynolds*, 41 F.3d at 1365. The Court will not review what counsel should have done, but only what was constitutionally compelled. In this case, review of the transcript and records in the case reveals that counsel's failure to rely on

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[25] The State was permitted to evaluate Hogan's mental health because Hogan's counsel anticipated using his mental health as a defense to the charges. Counsel, however decided not to rely on this defense. Therefore, when the State proffered its expert testimony regarding Hogan's violent nature, the defense objected, noting "They only got to examine our client because we said we would introduce that. They only got to examine our client because we said we would introduce it. We didn't introduce insanity. Not one single thing has been introduced whatsoever. To be able to come in the back door and get this in. I mean. Judge it just can not be. It can't be." (Tr. 1228).

psychological evidence was, as found by the Court of criminal Appeals, sound strategy. If counsel had utilized its psychological information, the State would have been free to utilize the opinions of its experts, that Hogan presented a threat due to his violent nature. Therefore, the Court cannot find that counsel's performance with regard to Hogan's mental health was deficient. Additionally, the Court finds Hogan fails to establish he was prejudiced by counsel's failure to present such evidence.

In light of the evidence available to the State on this issue, the Court cannot find that the Court of Criminal Appeals decision that counsel was not ineffective for failing to present mental health evidence was unreasonable. Habeas relief is not appropriate on this basis.

2. Failure to Investigate Mitigation Evidence

Hogan argues counsel failed to sufficiently investigate mitigation evidence and that further investigation would have revealed additional mitigation evidence. As noted in *Strickland*, 466 U.S. at 700, Petitioner has failed to demonstrate how additional mitigation evidence would have outweighed the aggravating circumstance established by the State's evidence.

"The appropriate standard for evaluating counsel's pretrial investigation is reasonableness under the circumstances." *Futch v. Dugger*, 874 F.2d 1483, 1486 (11th Cir. 1989). The Tenth Circuit has found that merely because defense counsel could have done more investigation into a defendant's background for mitigating evidence alone does not establish ineffective assistance of counsel.

Dutton v. Brown, 812 F.2d 593, 598 (10th Cir.), *cert. denied*, 484 U.S. 836 (1987).

> In the context of a challenge to counsel's ineffectiveness at the penalty phase of a capital trial, prejudice is established if the petitioner demonstrates 'a reasonable probability that, absent the errors, the sentencer, – including an appellate court, to the extent that it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'

Brewer v. Reynolds, 51 F.3d 1519, 1523 (10th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 936 (1996) (quoting *Strickland*, 466 U.S. at 695, and *Osborn v. Shillinger*, 861 F.2d 612, 626 n. 12 (10th Cir. 1988)).

Petitioner fails to specify what potentially mitigating evidence was not sufficiently investigated and how such factors might have affected the outcome of his sentencing phase. The Court cannot find that counsel was ineffective for failing to investigate unknowns or in failing to present such unknowns to the jury. *Hatch v. State*, 58 F.3d 1447, 1457 (10th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1881, 135 L.Ed.2d 176 (1996) ("petitioner does not state what exculpatory evidence an adequate investigation would have discovered or how this evidence would have affected the outcome of the innocence/guilt phase of the trial. Thus, even if counsel's pretrial investigation were constitutionally deficient, petitioner has not demonstrated any resulting prejudice."). Habeas corpus relief is therefore denied on this basis.

3. Failure to Permit Hogan to Testify and Failure to challenge the Medical Examiner's Testimony

Hogan contends counsel was constitutionally ineffective because it did not permit him to testify. The Oklahoma Court of Criminal Appeals considered the issue, and noted: "[t]here is nothing in the record regarding this accusation, Hogan simply makes an unsupported statement." (Order affirming denial of post-conviction relief at 4). The court also noted that Hogan failed to present any relevant authority for the proposition, and therefore, the issue was forfeited pursuant to Okla. Stat. tit. 22 ch. 18 App, Rule 3.5(C)(i), (4).[26]

Hogan argues he was denied effective assistance because counsel stipulated to the medical examiner's statement that all of Lisa Stanley's wounds were antemortem. The Court of Criminal Appeals held this issue as forfeited because there was no record of the claimed stipulation. Again, the court relied on Rule 3.5(C)(1), (4).

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[26] 22 Okla. Ch. 18, App. Rule 3.5(C)(1) provides:

> Both parties must provide a brief argument, exhibiting a clear statement of the point of law or fact to be discussed with a reference to the pages of the record filed and the authorities relied upon in support of each point raised. . . .

Rule 3.5(C)(4) states that "[f]ailure to present relevant authority in compliance with these requirements will result in the issue being forfeited on appeal. . . . "

Respondent contends that the Court of Criminal Appeals holding resulted in these two issues being procedurally barred, and therefore, this Court may not consider the merits of the claims. The State argues that the independent and adequate state law doctrine discussed above applies to these claims as well.

The first question to be addressed is whether Rule 3:5(C)(1), (4) was an independent and adequate state procedural law. The procedural bar as applied to Hogan's claims was "independent," because "it was the exclusive basis for the state court's holding." *Maes v. Thomas*, 46 F.3d 979, 985 (10th Cir.), *cert. denied*, 514 U.S. 1115 (1995). The procedural bar was "adequate" because the Oklahoma Court of Criminal Appeals has consistently refused to review claims not accompanied by the appropriate authority or citation to the record. *See e.g., Braun v. State*, 937 P.2d 505, 515 (Okla. Crim. App. 1997); *Brown v. State*, 933 P.2d 316, 325 (Okla. Crim. App.), *cert. denied*, 513 U.S. 1003 (1994); *Selsor v. Turnbull*, 947 P.2d 579, 583 (Okla. Crim. App. 1997).

Petitioner alleges no cause and prejudice for his failure to properly address these two issues during state post-conviction proceedings; nor does he argue that a fundamental miscarriage of justice will occur if the issues are not addressed by this Court. Hogan argues that he presented the requisite materials to the state court during post-conviction proceedings, however, this Court will not review that determination. The Court finds these two claims to be procedurally barred, and therefore, they will not be addressed on the merits and habeas relief is inappropriate.

4. Failing to Request a Second Degree Murder Instruction

The Court ruled above that Hogan was not prejudiced by the trial court's failure to give instructions on the offense of second degree murder. Therefore, Hogan was not prejudiced by counsel's failure to raise the issue, and habeas relief is denied on this basis.

5. Failure to Request a Definition of "life without parole."

The Court ruled above that Hogan was not entitled to any further instruction on the definition of "life without parole." Therefore, Hogan was not prejudiced by counsel's failure to request such instruction, and habeas relief is denied on this basis.

6. Failure to Challenge Heather Murphy's Statement.

The Court ruled above that Hogan was not prejudiced by the introduction of any hearsay statement of Heather Murphy, a child. The Court also found no prejudice stemming from counsel's failure to request an *in camera* hearing. Habeas relief is denied on this basis.

B. Appellate Counsel

Petitioner contends appellate counsel was also ineffective for failing to raise the following issues: (1) the trial court's failure to give second degree murder instructions;

(2) the trial court's failure to instruct the jury properly with regard to self-defense; (3) the trial court's failure to define "life without parole," after the jury signaled its confusion; (4) the State's inadequate notice with regard to the evidence and witnesses to be presented in the second stage; (5) the trial court's error in admitting the hunting knife; and (6) the trial court's erroneous instructions to the jury with regard to sentencing.

The Court has considered each of these issues with regard to the procedural bar, and determined Hogan failed to meet the requirements of *Strickland*. Therefore, habeas relief is denied on this basis.

DISCOVERY AND AN EVIDENTIARY HEARING

Embodied in the AEDPA is a new standard governing a habeas petitioner's request for an evidentiary hearing. Under amended § 2254(e)(2), if the applicant failed to develop the factual basis of a claim in state proceedings, the court will not hold an evidentiary hearing unless the petitioner establishes:

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence, and

(iii) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional

> error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Petitioner makes not showing that the claims upon which he seeks an evidentiary hearing fall under § 2254(e)(2)(A)(i).

Petitioner seeks an evidentiary hearing on two issues, ineffective assistance of counsel and the state's failure to test certain evidence for the presence of PCP. Petitioner contends an evidentiary hearing is necessary on his ineffective assistance of counsel claim to develop the facts surrounding the claim and to demonstrate the prejudice he suffered. However, Petitioner fails to establish how this request fulfills any of the three categories listed above. Additionally, Petitioner is not entitled to a fishing expedition in search of evidence to support his allegations. The Court finds no need for an evidentiary hearing on the issue of counsel.

With regard to the presence of PCP and ability of scientific technology to determine the presence of such, the Court finds nothing in the record to support Hogan's assertion that the marijuana he smoked with Lisa Stanley was allegedly laced with PCP. He made no statements to that effect that appear within the record, including his confession. Additionally, the medical staff that treated him testified he did not appear high on PCP when treated, shortly after the killing.[27] The Court will not hold

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[27] As noted herein, a sample of dried blood was tested for the presence of PCP. Although Petitioner attempts to challenge the validity of the test, asserting that dried blood could not be

an evidentiary hearing based solely on Petitioner's self-serving allegations regarding the presence of PCP in the marijuana.

Petitioner's vaguely supported assertions that more fact finding is warranted do not satisfy the clear and convincing standard as set forth in the AEDPA. As noted by the Third Circuit in *Zettlemoyer v. Fulcomer*, 923 F.2d 284 (3rd Cir. 1991), "bald assertions and conclusory allegations do not provide sufficient ground to warrant requiring the state to respond to discovery or to require an evidentiary hearing." Similarly, in *Deputy v. Taylor*, 19 F.3d 1485, 1493 (3rd Cir. 1994), the Court stated:

> [A]n evidentiary hearing should not be available to a habeas petitioner . . . unless the petitioner sets forth facts with sufficient specificity that the District Court may be able, by examination of the allegations and the response, if any to determine if further proceedings are appropriate.

The Court concludes that the claims delineated by Petitioner may be decided on the pleadings submitted. The disputes raised by Petitioner's claims are legal in nature and can be resolved by the Court without resort to live testimony and argument. Accordingly, Petitioner's Motion for an Evidentiary Hearing is denied. The Court next considers Petitioner's request for discovery.

Rule 6 of the Rules Governing Federal Habeas Corpus Proceedings provides:

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accurately analyzed at the time of Lisa Stanley's murder, his bald assertion in this regard is not a sufficient basis for granting an evidentiary hearing.

> A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise.

In addition, the commentary to Rule 6 states that the court shall provide for discovery "[w]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally. . . . " (citing *Harris v. Nelson*, 394 U.S. 286, 300 (1969); *see also East v. Scott*, 55 F.3rd 996, 1001 (5th Cir. 1995)).

The "liberal standard" for discovery delineated by the Federal Rules of Civil Procedure is "severely curtailed when discovery is sought in habeas corpus cases." *Gilday v. Callahan*, 99 F.R.D. 308, 309 (D. Mass. 1983). In addition, as observed by the court in *Ward v. Whitley*, 21 F.3d 1355, 1367 (5th Cir. 1994):

> Conclus[ory] allegations are not enough to warrant discovery under Rule 6 of the Federal Rules Governing Section 2254 Petitions; the petitioner must set forth specific allegations of fact. Rule 6, which permits the district court to authorize discovery on good cause show [sic], does not authorize fishing expeditions.

In his discovery pleadings, Petitioner seeks the production of various items which he claims are relevant to his application for federal habeas relief. Specifically he requests documents in the custody and control of the prosecutor's office, the Sheriff's Department, the Police Department, the OSBI, the Medical Examiner and the

Court Clerk's Office, including, body samples from Lisa Stanley's body, blood spatter reports used by forensic examiners and crime scene technicians and police reports or investigative reports.

With regard to Hogan's request for tissue samples, the Court refers to its above discussion regarding PCP and the need for an evidentiary hearing. The Court finds no need for discovery on this issue. With regard to blood spatter reports, the Court knows of no basis for releasing the blood spatter reports to Petitioner. Petitioner fails [sic] provide the Court with sufficient justification for providing blood spatter reports and additional police reports.

As stated by the court in *Deputy v. Taylor,* 19 F.3d 1485, 1493 (3rd Cir. 1994), "petitioners are not entitled to go on a fishing expedition through the government's files in hopes of finding some damaging evidence." quoting *Munoz v. Keene,* 777 F.Supp. 282, 287 (S.D.N.Y. 1991). It has been observed that "[h]abeas corpus is not a general form of relief for those who seek to explore their case in search of its existence." *Ward,* 21 F.3d at 1367 (quoting *Aubet v. Maine,* 431 F.2d 688, 689 (1st Cir. 1970)). With regard to the items and information Petitioner requests, he has failed to demonstrate that the Court should exercise its discretion to order discovery pursuant to the Federal Rules of Civil Procedure. In addition, Petitioner has failed to discharge his burden in showing entitlement to an evidentiary hearing. Accordingly, Petitioner's Motions for Discovery is [sic] denied. The Motion to Deem the Motion for Discovery Confessed is also denied.

CONCLUSION

For the reasons stated herein, the Court DENIES the Petition for Habeas Corpus.

It is so ordered this 24th day of April, 1998

/s/ David L. Russell
DAVID L. RUSSELL
CHIEF UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

KENNETH EUGENE HOGAN, Petitioner, v. RON WARD, Warden, Oklahoma State Penitentiary, Respondent.	)	CIV-97-134-R

JUDGMENT

(Filed Apr. 24, 1998)

Judgment is hereby entered in favor of Respondent on Kenneth Hogan's Petition for a Writ of Habeas Corpus.

It is so ordered this 24th day of April, 1998

/s/ David L. Russell
DAVID L. RUSSELL
CHIEF UNITED STATES
DISTRICT JUDGE

ENTERED ON JUDGMENT
DOCKET ON 4-24-98

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

KENNETH EUGENE HOGAN, Petitioner,	)	CIV-97-134-R
v.	)	
RON WARD, Warden, Oklahoma State Penitentiary, Respondent.	)	

ORDER

(Filed June 15, 1998)

This matter comes before the Court on the Motion to Alter or Amend Judgment, filed by Petitioner, Kenneth Eugene Hogan, pursuant to Fed. R. Civ. P. 52(b) and 59(e). Respondent, Ron Ward, responded in opposition to the motion. The court has considered the parties' submissions and finds as follows.

On April 24, 1998, the Court entered an Order denying Hogan's petition for a writ of habeas corpus. Judgment was entered in Respondent's favor on that day. Hogan filed the instant motion seeking relief from the Judgment, specifically addressing the Court's determination that he was not entitled to first degree manslaughter instructions and that he was not entitled to second degree murder instructions. The Court will consider each of the issues in turn.

Petitioner contends the Court erred in denying habeas relief on his allegation that the trial court violated his constitutional rights by failing to instruct the jury on first degree manslaughter. A capital defendant is entitled to lesser included offense instructions if there is evidence in the record to support such instruction. *Beck v. Alabama*, 447 U.S. 625 (1980). This ensures no arbitrary and capricious decisions are rendered in capital cases. *Id.* Due process requires a lesser included offense instruction *only* when the evidence warrants such an instruction. *Hopper v. Evans*, 456 U.S. 605, 611 (1982).

In *Beck*, the jury was instructed on the theory of first degree murder. During trial it was revealed that the murder was committed in the course of a robbery, and that an accomplice killed the victim. However, pursuant to Alabama statute, the judge was prohibited from giving the jury instructions on the lesser included offense of felony murder. The jury was required either to convict the defendant and sentence him to death or to acquit him of all charges. The Supreme Court held that if evidence exists that defendant is guilty of a serious offense, but some doubt exists as to an element that would justify a conviction of a capital offense, failure to give a lesser included offense instruction enhances the risk of an improper conviction. *Id.* at 637.

The Court found in its April 24, 1998 Order, that the evidence did not entitle Petitioner to instructions on first degree manslaughter. For a killing to constitute first degree manslaughter it must be accomplished without a design to effect death, and in a heat of passion. Okla. Stat. tit. 21 § 711. The Court found in its prior Order that the

evidence at trial was insufficient to support Hogan's theory he stabbed Lisa Stanley without a design to effect death. *See Smith v. State*, 932 P.2d 521, 532 (Okla. Crim. App. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 2522 (1997); *Darks v. State*, 954 P.2d 152, 161 (Okla. Crim. App. 1998) (the nature of defendant's actions omits a reasonable inference that he did not have the intent to kill his victim). The twenty-two stab wounds, including one that cut her voice box and larynx, preclude the Court from accepting Hogan's argument.

The Court recognizes that the apartment in which Ms. Stanley was killed was not large, and did not intend to imply otherwise by noting, as supported by the evidence, that the stabbing occurred throughout the Stanley apartment. The evidence at trial established that Lisa Stanley was stabbed in the kitchen, where spattering was found on the walls and floor, and in the adjacent living room. Lisa Stanley had blood on both the top and bottom of her socks, indicating that she stepped in blood during some part of the stabbing. Tom Bevel, the bloodstain expert, theorized that Lisa Stanley moved from the kitchen to the couch, leaned into the couch, and then fell to the carpet, where a large pool of blood was found next to her neck wound, all this while being stabbed by Hogan.

Petitioner stresses that the entire confrontation in the Stanley apartment occurred in short course. However, premeditation to support a finding of murder does not require intricate plots or a substantial amount of time, it may be acquired in an instant. Okla. Stat. tit. 21 § 703. The Court finds that from the evidence presented no reasonable jury could find Hogan acted without a design to

effect death. Accordingly, the Motion to Alter or Amend is denied in this regard.[1]

Petitioner also asserts the Court erred in denying relief with regard to the trial court's failure to give second degree murder instructions. In support of this proposition, Hogan relied on *Reeves v. Hopkins*, 102 F.3d 977 (8th Cir. 1996). On June 8, 1998, the Supreme Court overruled that decision in *Hopkins v. Reeves*, ___ S.Ct. ___, 1998 WL 292064 (1998), completely undermining Hogan's position. In *Hopkins*, the Supreme Court held that *Beck* does not require state courts to instruct on offenses that are not lesser included offenses of the charged crime under State law. Accordingly, the trial court in Hogan's case was not required to instruct the jury on second degree depraved mind murder, because it is not a lesser included offense of murder. *Willingham v. State*, 947 P.2d 1074, 1081 (Okla. Crim. App. 1997). Accordingly, the Motion to Amend is denied with regard to this claim.[2]

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[1] The Court also agrees with the Oklahoma Court of Criminal Appeals recent determination that *Beck* does not apply in situations where, as here, the jury was presented with sentencing options. In *Beck*, the jury was informed that a finding of guilt necessarily carried a death sentence. However, under Oklahoma's sentencing scheme, a jury is given three options after finding a defendant guilty of capital murder: death, life, and life without parole. "Oklahoma law provides viable options between acquittal and death, and the jury had the opportunity to express doubts about [Petitioner's] culpability during the sentencing phase." *Le v. State*, 947 P.2d 535, 547 (Okla. Crim. App. 1997). *See also Livingston v. Johnson*, 107 F.3d 297, 313 (5th Cir.), *cert. denied*, ___ U.S. ___, 118 S.Ct. 204 (1997).

[2] Additionally, the Court finds that because no reasonable juror could find that Hogan acted without a design to effect

For the reasons stated herein, Petitioner's Motion to Alter or Amend Judgment is DENIED.

It is so ordered this 15th day of June 1998

/s/ David L. Russell
DAVID L. RUSSELL
CHIEF UNITED STATES
DISTRICT JUDGE

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death, second degree murder instructions would have been improper, even if *Beck* applied. Second degree murder under Oklahoma law requires that the conduct is not done with the intention of taking a life. Okla. Stat. tit. 21 § 701.8. For the same reasons first degree manslaughter instructions were improper, so were second degree murder instructions.

Kenneth Eugene HOGAN, Appellant,

v.

The STATE of Oklahoma, Appellee.

No. F-88-918.
Court of Criminal Appeals of Oklahoma.
June 8, 1994.
Order Denying Rehearing July 27, 1994.

Irven R. Box, Diane Clowdus, Oklahoma City, for appellant at trial and on appeal.

Robert H. Macy, Dist. Atty., Sandra Stensaas, Asst. Dist. Atty., Oklahoma City, for the State at trial.

Robert H. Henry, Atty. Gen., Carol Price Dillingham, Asst. Atty. Gen., Oklahoma City, for appellee on appeal.

OPINION

JOHNSON, Vice Presiding Judge:

The appellant, Kenneth Eugene Hogan, was charged with the crime of Murder in the First Degree in the District Court of Oklahoma County, Case No. CRF-88-646, before the Honorable James L. Gullett, District Judge. Such charge was in violation of 21 O.S.1981, § 701.7. A jury trial was held wherein the jury returned a verdict of guilty and set punishment at death by lethal injection. The trial court sentenced the defendant in accordance with the verdict by the jury. From this Judgment and Sentence, the defendant has perfected his appeal to this Court.

STATEMENT OF FACTS

The appellant (hereinafter referred to as the defendant or appellant) had been friends with the victim, Lisa Renee Stanley, for several years. The exact nature of the friendship or the extent of friendship, whether sexual or not, was disputed at trial. The defendant's wife indicated she had received between thirty and thirty-five phone calls from the victim during the preceding year; further, the victim's husband knew of the friendship between the defendant and the victim, and was apparently quite jealous over that relationship.

The events in question occurred on January 28, 1988. George Stanley, the husband of the deceased, returned home at approximately 8:15 p.m. and discovered his wife's body. She had been stabbed some twenty-five times in the head, neck, chest and back. Her throat had been cut through the larynx.

The police investigation revealed that the murder scene had clear evidence of a struggle. The furniture had been turned over or knocked around, wedding pictures were thrown on the floor, and a purse was turned over on a dinette table. A bathroom door had been kicked in. Inside the bathroom, the detectives found a large butcher knife and red stains in the sink which appeared to be blood. Evidence was collected from the scene, including the knife, various hair and fiber samples, together with blood samples from around the house. Also taken was the victim's clothing and carpet from the apartment.

From evidence gathered at the scene and the statement given by the defendant, the defendant and deceased were smoking marijuana during the afternoon of January

28, 1988. The defendant had told his wife that he was going to work but went to the deceased's home when her husband was gone. The defendant admitted that he was at the time of the incident charged with second degree burglary in Cleveland County and he said the deceased had asked him to steal or get her a stereo. The defendant stated he refused to do so and the two started arguing. The defendant stated he was leaving but the deceased refused his exit and threw a coat rack down, then began shouting "no, Ken; no, don't Ken". The defendant indicated he tried to quiet the deceased but she ran into a bathroom and locked the door, which he finally kicked down.

The deceased ran to the front door and yelled for help but the defendant kicked the door shut and threatened to tell the deceased's husband and her mother about an abortion that she had shortly before her marriage. The defendant stated the deceased then "got a wild look in her eye" and went to the kitchen. He stated he tried to leave but the deceased came back into the room with a knife and "pushed" the knife at the defendant. Defendant's hand was cut when he grabbed the knife intending to fend off the stab wound. The deceased then ran to the kitchen indicating that she was going to get another knife. Appellant stated he was afraid the deceased was going to tell the police that he had tried to rape her.

The defendant then chased the victim, stabbing her numerous times, which resulted in her ultimate death. He then disarranged the room, hoping to create the effect of a fight between the deceased and an unknown intruder. He cleaned his wounds, left the apartment, and drove to a hospital emergency room for treatment of the cuts.

Appellant was admitted to the Moore Hospital at approximately 1:45 p.m. on January 28, 1988. The emergency room clerk who processed the defendant indicated that the defendant gave two different stories as to how the accident occurred and appeared nervous. The doctor who treated the defendant indicated that the defendant gave a combination of the first two stories and that he appeared to be well-oriented, and did not appear to be suffering from either an emotional disturbance nor under the influence of drugs.

The defendant asked his wife to tell the police that he had been injured in the garage at home and that he was home all day on January 28th. When his wife spoke to the police, she informed them the defendant was not home on the day of the murder and that he had asked her to tell them another story. A search waiver was obtained and various clothing items matching the description of clothes the defendant wore on the day of the murder were obtained. Tests on the clothing indicated a blood splatter pattern on the flannel shirt front and a defused blood transfer pattern on the knee of some sweat pants.

The defendant spoke with Detective Horn on February 3, 1988, and made various statements with various inconsistencies before his confession. The confession was quite detailed as to what occurred on the date of the homicide.

A police blood splatter expert indicated there were large amounts of blood at the end of the kitchen counter, in front of the sofa and on the carpet under the victim, and smaller amounts in the dining area. The blood in the bathroom appeared to have been diluted and the pattern

increased in volume as the trail led to the living room. From the way blood was found on the victim and the evidence at the scene, the expert concluded the victim remained in an upright position during a portion of the stabbing. The evidence also indicated that the initial stabbing occurred in the kitchen with the final blows coming in the living room area.

PROPOSITIONS OF ERROR

First, the appellant states the trial court erred in refusing to instruct the jury with the defendant's requested instruction regarding the crime of manslaughter in the first degree. We find this proposition of error to be without merit. The facts make it clear that a heat of passion theory is not justified. The defendant's statements, together with the evidence, show a clear design to effect the victim's death in a cold and calculated manner.

The requested instruction was not given after a long and heated argument by counsel in this case. This Court has held heat of passion alone does not reduce a homicide to manslaughter without adequate provocation. We have held the fatal blow or blows must be the unpremeditated result of the passion aroused. *Ex parte Bollin*, 3 Okl.Cr. 725, 109 P. 288 (1910). The statement of the defendant plus the facts show that the blows did not come because of any overt acts on the part of the deceased, but came because the defendant believed the reporting of attempted rape, together with his pending burglary charge, would result in his imprisonment. The trial court only has the duty to instruct on lesser degrees when

required by the evidence. *Dunford v. State*, 702 P.2d 1051 (Okl.Cr.1985); *Jones v. State*, 650 P.2d 892 (Okl.Cr.1982).

There is sufficient evidence to support the premeditation in this case, which includes the manner of the killing and the pattern of the wounds. This Court has previously held the trial court's decision not to give a first degree manslaughter instruction was supported in part by evidence of twenty-five stab wounds that the appellant inflicted upon the victim. *Duvall v. State*, 825 P.2d 621 (Okl.Cr.1991), cert. denied, 506 U.S. 878, 113 S.Ct. 224, 121 L.Ed.2d 161 (1992).

The evidence clearly shows that the death was the result of a brutal and repeated stabbing. Evidence shows that the attack began in the kitchen, went from there to the bathroom, and finally to the living room where the victim died. The defendant stated he was putting on his coat and attempting to leave the scene of this brutal killing. However, instead of leaving the scene, he followed the deceased into the kitchen from which point a bloody trail to the ultimate death ensued. This evidence reveals the defendant was clearly not acting out of a heat of passion, but premeditated murder.

The second proposition of error is the trial court's failure to instruct on the defense of voluntary intoxication. The defense of voluntary intoxication has been used to show a lack of criminal intent to commit a murder and thus reduce such offense to a manslaughter. *James v. State*, 648 P.2d 1251 (Okl.Cr.1982). Before the instruction can be given, evidence must be introduced that raises a reasonable doubt as to a person's ability to form the prerequisite intent. *Norman v. State*, 648 P.2d 1243 (Okl.Cr.1982). The

evidence in this case does not warrant such an instruction. Although appellant claimed to have been smoking marijuana, this did not raise a reasonable doubt as to his ability to form intent. Dr. Self testified that she did not think the defendant was intoxicated nor under the influence of drugs; therefore, the instruction was not warranted.

Appellant's next proposition is the court erred in failing to strike the Bill of Particulars thereby depriving the defendant the opportunity to fully present his defense by failure of the State to obtain drug testing of deceased's blood as the State had agreed. The facts in this case show the State did indicate it would test the victim's blood, but shortly before trial it was discovered that the medical examiner's office had destroyed all but one vial of the blood. A test was performed as to the presence of PCP and the results were negative. However, no further blood test could be performed. The defendant contends that the blood test would have provided evidence to support his statement that the marijuana they smoked was "laced" with some other drug. The defendant is asking this Court to place itself in a speculative position and grant relief based upon a possibility that there would be exculpatory evidence.

The Supreme Court of the United States states "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law". *Arizona v. Youngblood,* 488 U.S. 51, 58, 109 S.Ct. 333, 334, 102 L.Ed.2d 281 (1988). The defendant has not shown that the State has acted in bad faith. The destruction of

the evidence occurred through inadvertence and not bad faith. Therefore, we find no error.

Next, appellant contends that there was error in failing to sustain the defendant's motion in limine to prevent the State from contending defendant committed murder to avoid arrest and prosecution for attempted rape. It should be noted that this is not other crimes evidence. The evidence is clear that the defendant, in his own statement, believed that the deceased would report an attempted rape. Therefore, the State properly argued the belief by the defendant that a report would be made which might be a motive for the murder. The State, in this instance, would have a liberal right of free speech as to such motive. *McCaulley v. State*, 750 P.2d 1124 (Okl.Cr.1988). Therefore, we find no merit to this proposition of error.

The fifth proposition of error is the State improperly commented on appellant's right to silence. The law is clear that counsel cannot comment on a person's silence. *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). *See also Hanf v. State*, 560 P.2d 207 (Okl.Cr.1977). The comment that was made in this particular case "because he had to go to Lisa's funeral" is not a reference to the appellant's privilege against self-incrimination. This comment was based upon evidence of appellant's statements to the police. In this case, the comment was on pre-arrest silence. Therefore, there would be no error.

Next, appellant states that the trial court erred by allowing an "expert witness" called by the State to testify regarding blood splatters found at the scene of the crime.

This Court has recognized and adopted blood splatter evidence as admissible. *Farris v. State,* 670 P.2d 995 (Okl.Cr.1983). The evidence as submitted by the expert at trial did not overstep the bounds of opinion testimony. The defendant places emphasis on statements made during closing argument. The District Attorney did make comments during closing argument as to the blood splatter evidence. The only question is did the testimony go too far or were the comments by the District Attorney egregious. We do not find that the comments by the District Attorney went too far and, therefore, we find no reversible error.

The seventh proposition of error is the trial court erred by allowing evidence of other crimes to be introduced without proper notice of the State's intent to offer such evidence. The defendant contends that he was not given proper notice of the State's intention to introduce other crimes evidence as required by this Court. *Burks v. State,* 594 P.2d 771 (Okl.Cr.1979). This notice is to prevent surprise. *Drew v. State,* 771 P.2d 224 (Okl.Cr.1989). The facts in this case show there was no surprise because the evidence that is complained of came directly from the defendant's confession. The defendant in his statement indicated that he feared going to prison upon a pending burglary charge and that the victim would report an attempted rape. These crimes do not fall within the bounds of a *Burks* notice. They rather go to motive. *Peters v. State,* 727 P.2d 1386 (Okl.Cr.1986). Therefore, this proposition is without merit.

The next alleged error has to do with the trial court allowing the State to offer incompetent or prejudicial evidence. Such evidence is that the defendant was likely

to commit future acts of violence and would constitute a continuing threat to society. The jury in this case did not find this aggravator but only the aggravator of especially heinous, atrocious or cruel. The defendant complains that the court improperly admitted testimony of a police officer and a District Attorney investigator relating to unadjudicated crimes. These had to do with (1) an unadjudicated lewd molestation incident involving a twelve-year old girl; (2) an incident where the defendant shot out store windows of a former employer; and (3) a threatening letter the defendant wrote to a former business partner.

This Court has heretofore held that when you consider the continuing threat aggravator, the State may introduce any relevant evidence including "evidence from the crime itself . . . , evidence of other crimes . . . , admissions by the defendant of unadjudicated offenses . . . , or any other relevant evidence." *VanWoundenberg v. State*, 720 P.2d 328 (Okl.Cr.1986), *cert. denied*, 479 U.S. 956, 107 S.Ct. 447, 93 L.Ed.2d 395 (1986). There was no error as the evidence was properly admitted under *VanWoundenberg*. In addition, the aggravator was not even found by the jury. Therefore, this proposition is without merit.

In proposition nine, the defendant complains the trial court erred by failing to allow the jury to hear an audio tape of the defendant's confession after the jury had made a request to hear the tape. The jury, after only a few minutes deliberation, sent a note asking to be allowed to have a copy of the tape of defendant's statement, a tape recorder or a transcript of defendant's statement or both. The State objected saying that since they did not have the

opportunity to cross-examine the defendant, this would unduly emphasize his version of what happened in the case without an opportunity to cross-examine the defendant. The defense requested that the jury be brought back into open court to have a hearing to determine if the tape was needed for continued deliberations and if so, have the tape played in open court. The trial court refused this request. *Martin v. State*, 674 P.2d 37 (Okl.Cr.1983). This Court has made it clear the replaying of testimony or a statement is generally a matter of discretion with the trial court. *McDade v. State*, 752 P.2d 827 (Okl.Cr.1988). We have further held that unless an abuse of discretion occurs, we will not reverse the trial court. *Stewart v. State*, 751 P.2d 745 (Okl.Cr.1988); *Givens v. State*, 705 P.2d 1139 (Okl.Cr.1985). We do not see an abuse of discretion in this matter. The tape was introduced in this case as an exhibit and not the actual testimony of the defendant. Based upon the fact that this was an exhibit, the court has discretion in submitting exhibits to the jury. *Duvall v. State*, 780 P.2d 1178 (Okl.Cr.1989). Therefore, we find this proposition of error to be without merit.

The tenth proposition of error by appellant is the court erred by allowing the jury to view photographs that were prejudicial and inflammatory. The photographs were called gruesome due to "spreading" of the wounds by artificial means. The exhibits in question were Exhibits 64 through 70. Only one of these photographs has any evidence that anyone was holding the wound or spreading the wound apart. The photographs do graphically depict the extent of the injuries, but after examination we do not find there was any abuse of discretion as it relates to such photographs and, therefore, the proposition is

without merit. *Stout v. State*, 693 P.2d 617 (Okl.Cr.1984). The condition of the body was gruesome and the photos are a fair depiction of the deceased.

Defendant for the eleventh proposition of error indicates prosecutorial misconduct due to repeated instances of misconduct throughout the trial causing prejudice to defendant. We will try to separate these based upon first and second stage since the proposition spans the entire trial. Defendant contends in the first stage of the trial that the prosecutor was improper by injecting himself and the jurors into the position of deceased's husband, also expressing his personal opinion, commenting on the conduct of defense counsel and saying he wished the killing occurred in the twinkling of an eye. We have examined these comments in context and due to the fact that the defendant had confessed, we cannot find that these comments prejudiced the jury into rendering a verdict of guilty. Therefore, we find no error.

As it relates to the second stage closing argument, the following items are noted: (1) calling Stanley a little girl and references to her small size; (2) attempting to align the jury with the District Attorney and police; (3) comments about defense counsel; (4) discounting Hogan's mitigating evidence; (5) Hogan's lack of remorse; (6) referring to the life Hogan will lead in prison while Stanley "lies cold in her grave"; (7) advising the jury Hogan will kill again; and (8) appealing for sympathy for the victim. Most of these comments were objected to by defense counsel. Some of these comments were true, as the size of the deceased, which was invited by defense counsel's argument. The State noted the defendant's past good acts do not outweigh what "he's capable of today".

This comment was not met with objection at the trial and does appear to be a proper comment on the evidence. In any heated contest, both sides are going to be zealous as to their remarks. The United States Supreme Court has indicated that appellate courts must look at the trial as a whole and not look to episodes in isolation. *United States v. Young,* 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). This Court has previously allowed the comments on the jury's duty, *Moore v. State,* 736 P.2d 161 (Okl.Cr.1987); also, an interjection of opinion based upon facts and evidence, *Carol v. State,* 756 P.2d 614 (Okl.Cr.1988).

This Court has examined the comments made by the prosecutor and taken in isolation some of these could be questionable. As the Supreme Court has told us, we must look at these in a proper perspective based upon the entire trial. *United States v. Young, supra.* We also have looked at the error as invited error, that is, when you look at the comments by both sides, it explains sometimes why the prosecution made the comments that they did make. Based upon our review, we feel that the error, if any, was therefore invited. *Teafatiller v. State,* 739 P.2d 1009 (Okl.Cr.1987). We do not find prosecutorial misconduct in this matter. Therefore, the proposition is without merit.

MANDATORY SENTENCE REVIEW

This Court must, under the provisions of 21 O.S.Supp.1985, § 701.13, determine whether (1) the sentence was imposed under the influence of passion, prejudice or other arbitrary factor, and (2) whether the evidence supports the finding of the statutory aggravating circumstance. The facts as to evidence supporting the

aggravating circumstances is abundantly clear. The death itself was exceedingly gruesome. There was clear evidence of a struggle, continued stabbings and a criminal episode that was long lasting. The defendant clearly tried to cover his tracks to the crime. It is clear that the victim remained in an upright position at least during part of the stabbing. Therefore, the victim was fully aware of what was happening and her impending fate. This clearly shows the aggravating circumstance of especially heinous, atrocious or cruel. The Court has reviewed the evidence herein as set forth under the propositions of error and we do not find that the sentence was imposed under the influence of passion, prejudice, or other arbitrary factor. In determining this factor, we have reviewed all of the facts and the evidence in the case.

The defendant in this trial was represented by an exceedingly competent criminal defense team. Their representation was more than adequate when you consider the overwhelming evidence confronting the attorneys. In the mitigation stage of this trial, the defense put on nine witnesses who testified to the fact that the defendant had a happy family, showed attention to his children, and was a loving father. The defense showed the defendant acted like a father, volunteered to be a helper in the jail when incarcerated and worked with a minister while he was incarcerated, had lent money to family members, and was a good worker. There was testimony the defendant was not a violent person, that as a gift he had even painted a house as a surprise for a family member. Testimony further showed the defendant was active in his church, and several witnesses testified the defendant's life was worth

saving. Even with this, the jury in weighing the mitigating evidence versus the aggravating evidence found the aggravator to prevail and found and imposed the death penalty.

It appears clear that there is ample evidence for the jury's finding. The only passion or prejudice would be remarks made by the State's attorney. These have been analyzed above and although questionable in some instances, when looked at in its full context, we do not find error in that regard. The facts clearly support the factor as it relates to the statutory aggravating circumstance. It is clear from the evidence that there were numerous stab wounds and that the deceased was fully aware for some period of time prior to her death that her death was, in fact, imminent. This clearly sustains the finding of especially heinous, atrocious or cruel.

The State, in this instance, tried the case on three aggravating factors: (1) especially heinous, atrocious or cruel; (2) continuing threat to society; and (3) purpose of avoiding or preventing a lawful arrest or prosecution. The jury on the returning of their verdict found only the aggravator of heinous, atrocious or cruel.

The facts clearly show the crime was perpetrated in a manner that was especially heinous, atrocious or cruel, and further, the review of this matter shows that the aggravating factor clearly outweighed the mitigating evidence.

DECISION

The finding by the jury that the defendant Kenneth Eugene Hogan was guilty of the crime of murder, first degree, is therefore **AFFIRMED** and in accordance with the jury's verdict that set punishment at death by lethal injection, the verdict is **AFFIRMED**.

LUMPKIN, P.J., and LANE and STRUBHAR, JJ., concur.

CHAPEL, J., dissents.

CHAPEL, Judge, dissenting:

I find that the trial court committed reversible error when it failed to instruct the jury on the lesser-included offense of Manslaughter in the First Degree. For that reason, Hogan's Judgment and Sentence should be reversed and remanded for a new trial. In addition, I find that the trial court erred in allowing the State to introduce evidence of unadjudicated offenses during the second stage of trial to prove the aggravating circumstance of continuing threat. For these reasons, I dissent.

At trial, Hogan requested the jury be instructed on the lesser-included offense of Manslaughter in the First Degree. Hogan contends his account of the murder of Lisa Stanley, as contained in his confession, warranted such an instruction. After extensive argument by trial counsel and the district attorney, the trial court refused to provide the instructions on the lesser-included offense. Curiously, however, the trial court did provide the jury with self-defense instructions based apparently on the evidence in Hogan's confession that Hogan's hand was severely cut and that the victim may have inflicted that

wound.[1] In my opinion, the trial court's refusal to provide the requested instructions on the lesser-included offense of manslaughter constitutes reversible error.

The trial court should instruct the jury on every degree of homicide where there is some evidence justifying an instruction on the lesser-included offense. *See Fowler v. State*, 779 P.2d 580, 585 (Okl.Cr.1989), *cert. denied*, 494 U.S. 1060, 110 S.Ct. 1537, 108 L.Ed.2d 775 (1990); *Lamb v. State*, 767 P.2d 887 (Okl.Cr.1988); *Lee v. State*, 700 P.2d 1017, 1019 (Okl.Cr.1985). When there is a doubt as to whether the instruction is warranted, the trial court should resolve that doubt in favor of giving the instruction. *Jones v. State*, 650 P.2d 892, 893 (Okl.Cr.1982); *Tarter v. State*, 359 P.2d 596 (Okl.Cr.1961).

Manslaughter in the First Degree is defined as a homicide "perpetrated without a design to effect death, and in a heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon; unless it is committed under such circumstances as constituted excusable or justifiable homicide." 21 O.S.1981, § 711(2). To warrant manslaughter instructions Hogan's confession must reasonably suggest he committed the murder in the heat of passion and without an intent to kill.

The State's key evidence against Hogan was his confession and it is this confession that provides "some

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[1] In Hogan's confession, he stated that Stanley stabbed his hand inflicting a deep and painful wound. The State argued at trial that Hogan inflicted the wound himself when he was stabbing Stanley.

evidence" sufficient to warrant a manslaughter instruction. In his confession Hogan stated that after he and Stanley argued and after he kicked in the bathroom door, Hogan tried to leave Stanley's home. Hogan said that as he was putting on his coat, Stanley returned from the kitchen and, without a word, "pushed" a knife at him. Hogan grabbed the knife but Stanley pulled the knife back inflicting a deep, painful wound on Hogan's hand. Stanley swung at Hogan again and he grabbed the knife from her. When Stanley ran back to the kitchen Hogan thought she was going to get another knife. Then, Hogan said, he killed Stanley by stabbing her with the knife she had used to cut him.

During his confession, Hogan maintained that he did not mean to hurt Stanley. In describing the stabbing, Hogan spoke in the third person saying "It was stabbing her and I couldn't stop him." (App.Br.Ex. A at 4) Hogan stated that he did not realize he had killed Stanley until the next day.

To support a manslaughter instruction, the evidence must suggest the act was done in the heat of passion. In Oklahoma, the passion must be so great as to render the mind " 'incapable of forming a design to effect death . . . ' " *Allen v. State*, 821 P.2d 371, 374 (Okl.Cr.1991); LaFave & Scott, *Substantive Criminal Law* § 7.10. The elements of heat of passion are: (1) adequate provocation; (2) a passion or emotion such as fear, terror, anger, rage or resentment; (3) homicide occurred while the passion still existed and before a reasonable opportunity for the passion to cool; and (4) a causal connection between the provocation, passion and homicide. *Allen*, 821 P.2d at 374. *See* Oklahoma Uniform Jury Instructions-CR 456.

Personal violence or aggression by the deceased of a sufficiently violent nature may be sufficient provocation. "It is the general rule that passion resulting from fright or terror may be sufficient to reduce a homicide from murder to manslaughter and such a killing may be closely akin to a killing in self-defense." *Wood v. State*, 486 P.2d 750, 752 (Okl.Cr.1971). A homicide may be reduced from murder to manslaughter when the defendant "believed that he was in great danger, even if he was not warranted in such belief or where the slayer although acting in self-defense was not himself free from blame." 486 P.2d at 752.

In *Williams v. State*, 513 P.2d 335 (Okl.Cr.1973), the defendant shot his wife seven times. Defendant testified he thought his wife had a butcher knife and was afraid she would hurt him, so he shot her. As to why he shot her more than once, defendant said " 'I just went blank and just stood there just pumping that gun . . . ' " *Id.* 337. Although the defendant stated he did not intend to use the gun on his wife, a police officer testified that after the incident defendant indicated no remorse and said he was glad it was over. The Court found this evidence reasonably suggested manslaughter stating:

> There were no other witnesses to the homicide other than defendant. The jury might reasonably interpret the evidence to show that the initial firing of the gun was caused by a sudden and unexpected attempt to attack defendant with a pair of scissors and fired by the defendant while in the heat of passion. The lack of premeditated

> design to effect death should have been submitted to the jury by a proper manslaughter in the first degree instruction.

513 P.2d at 338-339.

Here, Hogan contends he was provoked by Stanley's threats and by her stabbing his hand. Hogan stated the stab wound hurt, and, after he grabbed the knife away from Stanley, he thought she was returning to the kitchen to get another knife. The stab wounds Hogan sustained were significant and required surgery.

The trial court gave some credence to Hogan's claim that Stanley stabbed him because the trial court found the evidence was sufficient to instruct the jury on self-defense. Although a manslaughter instruction is no longer required whenever the trial court instructs the jury on self-defense, *Walton v. State*, 744 P.2d 977, 978-979 (Okl.Cr.1987), the fact that the trial court granted an instruction on self-defense indicates that the trial court found some evidence showing Stanley attacked Hogan. This finding weighs in favor of finding adequate evidence of provocation to allow the jury to address the issue of whether Hogan committed murder or manslaughter.

In addition, to receive a manslaughter instruction, there must be some evidence that Hogan lacked an intent to kill. Again Hogan's confession – the State's key piece of evidence – provides "some evidence" sufficient to warrant the giving of a manslaughter instruction. Hogan made the following statements in his confession: "I just went over to be friends, I didn't come over there to do any harm and now I've got to pay . . . it's not fair,"

(App.Br.Ex. A at 4); "I didn't even realize that I'd killed her until the next day, all I knew was my hand hurt and she was dead," (App.Br.Ex. A at 4); "I mean I didn't do it on purpose, I can't even sleep at night without waking up . . . " (App.Br.Ex. A at 4); "I didn't mean to hurt her," (App.Br.Ex. A at 3); "it was like I wasn't even there- . . . just somebody else . . . it wasn't even me." (App.Br.Ex. A at 4).

Several cases demonstrate that Hogan's declarations that he did not intend to kill Stanley is sufficient to warrant a manslaughter instruction. In *Provo v. State*, 549 P.2d 354 (Okl.Cr.1976), the defendant, during the course of a robbery, killed a store owner. In his statement to the police, the defendant stated he intended to rob the store owner, but not hurt him. *Id.* at 356. The defendant also expressed his hope that the store owner might survive. *Id.* The Court found defendant's statement regarding his intent combined with his desire that the victim live was sufficient to warrant a manslaughter instruction. In *Tarter v. State*, 359 P.2d 596 (Okl.Cr.1961), the defendant shot a man twenty times. After the shooting, defendant said to the victim, who was still alive, "This will teach you to break up my home." *Id.* at 598. Defendant mistakenly believed his wife was having an affair with the victim, and defendant's main defense was he was not guilty by reason of insanity. A police officer testified that, at the time of defendant's arrest, defendant stated he did not want to kill the victim, he " 'only wanted him to suffer as he had suffered.' " *Id.* at 599-600. When the defendant learned the victim had died he exclaimed " 'Oh, my God,' and began to cry." *Id.* at 600. Again, this Court found a manslaughter instruction was warranted. Likewise,

Hogan's statements, like the statements of the defendants in *Provo* and *Tarter*, reasonably suggest that Hogan lacked the requisite intent to kill.

As explained above, Hogan's confession presented "some" evidence reasonably suggesting that Hogan committed the offense of first degree manslaughter. It may be that the jury would have found Hogan to be guilty of First Degree Murder even if they had been provided with a manslaughter instruction. However, that is not the test. The test is whether there is *some* evidence reasonably suggesting that the lesser-included offense instructions are warranted. Hogan's confession clearly provides *some* evidence of manslaughter. The trial committed reversible error in failing to provide the manslaughter instructions.

Further, I would like to reiterate by objection to the use of unadjudicated offenses to support the continuing threat aggravating circumstance. *See Paxton v. State*, 867 P.2d 1309 (Okl.Cr.1994). In my opinion, both the Oklahoma and the United States Constitutions prohibit the use of this evidence at sentencing, despite the fact that it may be relevant. Our Constitutions prohibit the infliction of cruel and unusual punishment and afford all persons due process of law. The admission of unadjudicated offenses at the sentencing trial violates both Constitutional provisions. *See* Steven P. Smith, *Unreliable and Prejudicial: The Use of Extraneous Unadjudicated Offenses in the Penalty Phase of Capital Trials*, 93 Colum.L.Rev. 1249 (1993); *cf. State v. Bartholomew*, 101 Wash.2d 631, 683 P.2d 1079 (1984). I would therefore also grant relief to Hogan

based on the use of unadjudicated offenses to support the continuing threat aggravating circumstance.[2]

ORDER DENYING REHEARING AND DIRECTING ISSUANCE OF MANDATE

Petitioner, Kenneth Eugene Hogan, has filed his Petition for Rehearing which requests this Court to grant a rehearing in *Hogan v. State*, 877 P.2d 1157, 65 OBJ 2077 (Okl.Cr.1994). Appellant alleges that this Court has overlooked certain questions decisive of the case and duly submitted in reference to two propositions. These propositions are as follows, to-wit:

> I. The Court's Decision Regarding "Proposition I – The Trial Court Erred in Refusing to Instruct the Jury With the Defendant's Requested Instruction Regarding the Crime of Manslaughter in the First Degree" Is In Conflict With Controlling Authority That Was Not Called to the Attention of the Court.
>
> II. Appellant's Death Sentence Should be Vacated Because the Aggravating Circumstance "Heinous, Atrocious, or Cruel" is Unconstitutionally Vague on Its Face and As Construed by This Court, and the Corresponding Jury Instructions Are Unconstitutionally Broad.

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[2] The State introduced evidence of several unadjudicated offenses to support the continuing threat [sic] aggravating circumstance. The jury did not find that Hogan posed a continuing threat. However, relief is still warranted as this evidence may have improperly affected the jury's finding that the murder of Stanley was especially heinous, atrocious and cruel.

As it relates to Proposition I, appellant asserts that the trial court's failure to instruct the jury regarding the crime of manslaughter in the first degree as a lesser included offense was error and cites in regards to this a case that was not cited in the original brief. *Schad v. Arizona*, 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991); further, the case of *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). Appellant's position from the cited cases is that failure to give the lesser included instruction did therefore not allow a "third option" to be given to the jury when the evidence in the case supported a lesser included offense.

Appellant misreads the holding of the United States Supreme Court. The Court clearly held that the lesser included offense was not required when the evidence did not justify such instruction. It should be noted in this case that the jury was given a lesser included instruction as it related to self-defense and this clearly would be a "third option" for the jury. *Beck* held unconstitutional an Alabama statute that prohibited lesser included offense instructions in capital cases. That is not the case before us, the jury was instructed and given a lesser included offense option. Therefore, the requirements of *Beck* and *Schad* were met. *Schad* at ___, 111 S.Ct. at 2504.

In the second proposition of error raised in the Petition for Rehearing, appellant again asks this Court to find that the aggravating circumstance "heinous, atrocious, or cruel" is unconstitutionally vague on its face. Appellant concedes that this Court has on *numerous* times held that such terms are not unconstitutionally vague but asks this Court to again reassess it prior holdings. This Court will not reassess its prior holdings and is consistent in that we

do again make such finding, that the term is not unconstitutionally vague, and again cite previous holdings of this Court to that effect. *Romano v. State*, 847 P.2d 368 (Okl.Cr.1993), *Fisher v. State*, 845 P.2d 1272 (Okl.Cr.1992), and other numerous decisions.

Having examined the appellant's petition and the briefs relating to the Petition for Rehearing and Motion to Stay Mandate, the Court finds that the petitioner's Petition for Rehearing should be, and the same hereby is **DENIED**. The Clerk of this Court is directed to issue the mandate forthwith.

IT IS SO ORDERED.

/s/ Gary L. Lumpkin
GARY L. LUMPKIN,
PRESIDING JUDGE

/s/ Charles A. Johnson
CHARLES A. JOHNSON,
VICE PRESIDING JUDGE

/s/ James F. Lane
JAMES F. LANE,
JUDGE

/s/ Charles S. Chapel
CHARLES S. CHAPEL,
JUDGE

/s/ Reta M. Strubhar
RETA M. STRUBHAR,
JUDGE

HC 98-417

DEATH PENALTY
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KENNETH HOGAN, Petitioner-Appellant,	)	
v.	)	No. 98-6299
GARY E. GIBSON; THE ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, Respondents-Appellees.	)	

ORDER

Filed January 11, 2000

Before **SEYMOUR, BRISCOE** and **LUCERO,** Circuit Judges.

In order to correct a clerical error the following order is reissued nunc pro tunc and reads as follows:

Appellee's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the

court requested that the court be polled, that petition is also denied. Judge Henry is recused.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ Denise McClure
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KENNETH HOGAN, Petitioner-Appellant,	)	
v.	)	No. 98-6299
GARY E. GIBSON; THE ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, Respondents-Appellees.	)	

ORDER

Filed January 3, 2000

Before **SEYMOUR, BRISCOE** and **LUCERO,** Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied. Judge Henry is recused.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ Denise McClure
Deputy Clerk

No. 99-1926

Supreme Court, U.S.
FILED
JUL 7 2000
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

GARY E. GIBSON, Warden,
Oklahoma State Penitentiary and,
THE ATTORNEY GENERAL OF THE STATE OF OKLAHOMA,

Petitioner,

v.

KENNETH EUGENE HOGAN,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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12 pp

CAPITAL CASE

r Denying the Writ

criminal defendant does not lose his right to a lesser included offense under Beck v. Alabama, 447 U.S. 625 (1980), merely because the jury retains the discretion to impose a punishment less than death. Beck's educe the risk of unwarranted capital murder convictions by providing a ption of convicting a defendant of a lesser included offense when . Petitioner's argument that the sentencing discretion of Oklahoma juries k inapplicable was rejected appropriately by the Circuit Court. This Court e indicated Beck is applicable to discretionary sentencing schemes.

Oklahoma Court of Criminal Appeals determined Beck applied to t's case. However, the state appellate court reasoned incorrectly that a e instruction was a "third-option" that satisfied the requirements of Beck. l reasoning, in conjunction with an improper analysis of the issue as a lted in a state court decision that was afforded no deference by the Tenth rt of Appeals, in accordance with the dictates of the Anti-terrorism and eath Penalty Act.

Parties to the Proceeding

n of the case reflects accurately all parties to this proceeding before this Court.

federal cases related to this action or this Petitioner.

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(d) The Constitutional Provisions, Statutes and Rules which the Case Involves.

(1) Constitutional Provisions:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.
>
> *U.S. Const. amend. VI*;
>
> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
>
> *U.S. Const. amend. VIII*;
>
> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> *U.S. Const. amend. XIV, § cls. 3, 4.*

(2) Statutes Involved:

Title 28, United States Code § 2254(d)(1):

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> **(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.**

(3) Rules Involved.

None.

(e) Statement of the Case.

A complete procedural history and relevant factual background concerning the instant case is set forth in the Opinion by the Tenth Circuit Court of Appeals, issued December 8, 1999. Hogan v. Gibson, 197 F.3d 1297 (1999). A copy of that opinion is attached to Petitioner's Petition for Writ of Certiorari. Petition at App. 1 - App. 30.

Facts Material to Consideration of the Questions at Issue

Respondent's trial attorney requested a lesser included offense instruction of first degree manslaughter. Trial counsel's theory was that Respondent's confession to police, the central piece of evidence relied on by the prosecution, provided a basis for the jury to infer reasonably that Respondent killed the victim during the heat of passion without a design to effect her death. The trial court denied the request and did not instruct the jury on first degree manslaughter, in violation of fundamental rights guaranteed to Respondent by the Constitution. U.S. Const. amends. VI, VIII, XIV. The trial court did, however, instruct the jury on self-defense.

During rehearing of the direct appeal, the state appellate court determined the trial court did not err by refusing to instruct on first degree manslaughter. Finding Beck applicable, the state appellate court determined the goal of Beck was satisfied, and that the jury was provided a "third option" by the trial court's instruction on self-defense.

(f) **Direct and Concise Argument Amplifying the Reasons for Denying the Writ.**

(1) ***Beck applies in Oklahoma and is not impacted by any particular sentencing scheme.***

Despite the assertions of Petitioner, Oklahoma's sentencing scheme, or any sentencing scheme for that matter, does not impact the applicability of Beck. The purpose of Beck is to protect against the imposition of unwarranted capital murder convictions, a guilt phase determination. While a Constitutionally unreliable death sentence is a central concern of Beck, the rule of Beck addresses a jury's decision making process in the first stage of a capital murder trial. It is during the first stage of a capital murder trial in which the lack of a lesser included offense instruction can result in an unwarranted capital murder conviction. The unwarranted conviction for a capital crime increases the potential risk for an unreliable, unconstitutional, sentence of death.

> [W]hen the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense – but leaves some doubt with respect to an element that would justify conviction of a capital offense – the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.

Beck, 447 U.S. at 637. Unwarranted convictions result in capital murder cases when juries are forced into an all or nothing decision. Contrary to Petitioner's assertion, the all or nothing decision is, pursuant Beck, a decision between a conviction for capital murder and acquittal.

The idea Beck applies regardless of sentencing scheme structure is a concept reaffirmed by this Court in cases following Beck. In Spaziano v. Florida, 468 U.S. 447 (1984), this Court reaffirmed the application of Beck even though the Florida sentencing scheme permitted sentencing discretion.

> We concluded [in Beck] that "[s]uch a risk cannot be tolerated in a case in which the defendant's life is at stake" and that "if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, [a State]

> is constitutionally prohibited from withdrawing that option from the jury in a capital case."

Spaziano, 468 U.S. at 454 (quoting Beck, 447 U.S. at 637-38). The importance of Spaziano in analyzing the applicability of Beck in Oklahoma has been recognized by the Tenth Circuit. Hooks v. Ward, 184 F.3d 1206, 1228-29 (10th Cir. 1999).

> [I]n *Spaziano*, the Court addressed Petitioner's *Beck* claim on the merits, despite the fact that the Court was well aware that Florida's sentencing scheme permitted the jury to recommend life instead of death.

Hooks, 184 F.3d at 1228-29. This Court's decision in Schad v. Arizona, 501 U.S. 624 (1991), is equally instructive on the issue of Beck's applicability. The principal holding of Schad is that Beck does not require more than one lesser included offense instruction. However, it is important to recall this Court applied Beck after finding the judge who sentenced Mr. Schad did so subsequent to a sentencing hearing. Schad, 501 U.S. at 629. Certainly, there would be no need to have a sentencing hearing if the judge did not have sentencing discretion. Therefore, Shad provides yet another indication by this Court that Beck applies to sentencing schemes that permit sentencing discretion.

Hopkins v. Reeves, 524 U.S. 88 (1998), is this Court's most recent discussion of Beck. Hopkins does nothing to advance Petitioner's inapplicability argument. There can be no debate about the crucial distinguishing factor separating Hopkins from Beck. This Court stated explicitly:

> The crucial distinction between *Beck* and this case, as noted, is the distinction between a State's prohibiting instructions on offenses that state law recognizes as lesser included, and a States' refusing to instruct on offenses that state law does not recognize as lesser included.

Hopkins, 118 S.Ct. at 1902 n.7. The rule from Hopkins is that there is no Beck issue, and therefore no Due Process violation, when a defendant requests instructions on crimes that are not lesser included offenses under state law. Hopkins, 118 S.Ct. at 1901-02. Hopkins fails to shed any

light on the issue presented to this Court by Petitioner. Spaziano, Schad, and Beck support the conclusion that a state's sentencing scheme does not effect the Beck analysis. Petitioner has provided no compelling reason for this Court to decide otherwise.

(2) ***The authority relied on by Petitioner fails to evidence a split in the Circuits and fails to support Petitioner's inapplicability argument.***

Petitioner relies primarily on four cases from three different Circuits to argue there is a split of authority regarding the application of Beck. Petitioner relies on Livingston v. Johnson, 107 F.3d 297 (5th Cir. 1997); O'Rourke v. Endell, 153 F.3d 560 (8th Cir. 1998); Blair v. Armontrout, 916 F.2d 1310 (8th Cir. 1990) and Terry v. Petsock, 974 F.2d 372 (3rd Cri. 1992). Careful examination of these cases reveals they are all distinguishable from the instant case and do not evidence a split among the Circuits.

The defendants in both Livingston and Blair were tried before juries that received lesser included offense instructions. Livingston, 107 F.3d at 312; Blair, 916 F.2d at 1326. Thus, Beck was not violated in either Livingston or Blair. Consequently, these cases fail to support Petitioner's position.

In alternative holdings, both Livingston and Blair propose the idea that Beck should not apply when sentencing discretion is provided during the second phase of a capital murder case. Livingston provides no reasoned basis for this proposition and supports the alternative inapplicability argument with a passing, and inaccurate, interpretation of Schad. Schad, of course, does not support the inapplicability argument advanced in Livingston. Shad indicates, contrary to the position taken by the court in Livingston, that sentencing discretion is not a bar to the application of Beck. The alternative holding in Blair is even more suspect because the Eighth Circuit's

reasoning is unsupported by citation to any federal authority. The alternative holding in Blair is nothing more than an unfounded attempt to interpret Beck.

Similarly, Petitioner's reliance on O'Rourke is misplaced because that case involves no direct discussion of Beck. The analysis conducted in O'Rourke is an analysis of trial counsel's failure to request a lesser included offense instruction. The issue in O'Rourke was not a Beck issue, but instead, an ineffective assistance of counsel issue, analyzed in terms of the prejudice prong of the test announced in Strickland v. Washington, 466 U.S. 668 (1984). Consequently, O'Rourke does not provide any support for an alleged split in the Circuits regarding the application of Beck.

Petitioner's reliance on Terry is equally unpersuasive. That case involved a unique set of circumstances not found in this case, Beck, or many other cases. Far from being a persuasive piece of authority that adds to Petitioner's inapplicability argument, Terry is a case decided on an exceptional set of facts.

> Under all of these circumstances, we hold that the rule embodied in *Beck v. Alabama* and its progeny was not violated. Terry's jury was not forced to make an all-or-nothing choice between a guilty verdict for a capital offense and setting Terry free. On the contrary, the jury had several other options [during the first stage deliberations], all of which guaranteed that Terry would serve a sentence of life imprisonment. In short this jury faced virtually the antithesis of an all-or-nothing choice.

Terry, 974 F.2d at 379. This case clearly is inapplicable to the issue in the instant case. Indeed, Terry embraces Respondent's interpretation of Beck. The Third Circuit acknowledged that the all or nothing decision is one made in the first stage of trial between capital murder and acquittal. Moreover, the jury in Terry had sentencing discretion. The Third Circuit failed to make any direct ruling that Beck was inapplicable based solely on the sentencing discretion factor.

Finally, Petitioner's bald assertion that the Tenth Circuit Court of Appeals was wrong to grant habeas relief based on Beck is undermined by an examination of the thoughtful reasoning

applied by the Tenth Circuit to the Beck issue. In Hooks v. Ward, the Tenth Circuit held expressly that Beck applies in Oklahoma even though the jury retains sentencing discretion. The rationale behind the Tenth Circuit's finding is far more detailed, and based on much sounder reasoning, than the few alternative holdings cited by Petitioner.

> Several considerations convince us of the continuing force of *Beck*, even in jurisdictions that permit sentencing discretion. First, much of the language of *Beck* and its progeny is directed toward the enhanced reliability at the guilt phase of a capital case accomplished by giving lesser included instructions supported by the evidence. While *Beck* drew heavily for analogy from the line of cases in which the Court "invalidated procedural rules that tended to diminish the reliability of the sentencing determination," the *Beck* Court added that "[t]he same reasoning must apply to rules that diminish the reliability of the guilt determination." *Beck*, 447 U.S. at 638, 100 S.Ct. 2382 (emphasis added). Throughout *Beck*, the Court focuses on the reliability of the conviction. See, e.g., id. at 637, 100 S.Ct. 2382 ("For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense ... the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction." (emphasis added)).

Hooks, 184 F.2d at 1227 (footnote omitted). The Tenth Circuit's finding that Beck is applicable in Oklahoma, is based on this Court's decision in Beck, as well as later decisions by this Court giving further consideration to Beck-related issues. Hooks, 184 F.3d at 1228-29. The analysis conducted by the Tenth Circuit in Hooks was adopted in the instant case. Hogan v. Gibson, 197 F.3d at 1304. Petitioner's claim the Tenth Circuit's decision to apply Beck is in some way wrong is an argument without basis in fact or law, and should be rejected.

(3) Because the Oklahoma Court of Criminal Appeals did not adjudicate Respondent's Beck claim on the merits, the state appellate court's handling of the Beck issue was not entitled to deference pursuant a proper application of the Anti-terrorism and Effective Death Penalty Act.

Petitioner would have this Court believe the Tenth Circuit erred by failing to defer to the analysis of Beck conducted by the Oklahoma Court of Criminal Appeals. Even a cursory review of the decision reveals the Oklahoma court failed completely in its attempt to apply Beck properly.

Rightfully, the state appellate court's failure was afforded no deference pursuant the AEDPA. Title 28, United States Code § 2254(d)(1).

In reviewing the Beck issue, the Oklahoma Court of Criminal Appeals stated:

> Appellant misreads the holding of the United States Supreme Court. The Court clearly held that the lesser included offense was not required when the evidence did not justify such instruction. It should be noted in this case that the jury was given a lesser included instruction as it related to self-defense and this clearly would be a "third option" for the jury. Beck held unconstitutional an Alabama statute that prohibited lesser included offense instructions in capital cases. That is not the case before us, the jury was instructed and given a lesser included offense option. Therefore, the requirements of Beck and Shad were met.

Hogan v. State, 877 P.2d 1157, 1167 (Okla. Crim. App. 1994). Self-defense is not a lesser included offense of first degree murder in Oklahoma. Self-defense, if believed by a jury, will result in an acquittal. Consequently, self-defense is not the type of "third option" contemplated by Beck. The Tenth Circuit recognized this patent error:

> The Oklahoma Court of Criminal Appeals' rejection of Hogan's *Beck* claim on grounds either that Hogan's self-defense instruction constituted a lesser included instruction, or that the evidence was sufficient to support conviction on the greater charge, is in gross deviation from, and disregard for, the Court's rule in *Beck*.

Hogan v. Gibson, 197 F.3d at 1305. A grossly erroneous reading of dispositive Supreme Court authority is entitled to no deference by a federal court. Title 28, United States Code § 2254(d)(1). Finally, Petitioner's assertion the state appellate court's factual findings were entitled to a presumption of correctness is undermined by the state court's failure to address the central question regarding the sufficiency of the evidence supporting an instruction on the lesser included offense of first degree manslaughter. The Tenth Circuit recognized this failure of the state court as well:

> Because the Oklahoma Court of Criminal Appeals made no findings as to whether Hogan had presented sufficient evidence to warrant a first degree

> manslaughter instruction, it is axiomatic that there are no findings to which we can give deference.

Hogan v. Gibson, 197 F.3d at 1306; and, Title 28, United States Code § 2254(d)(1).

By not applying the law correctly, and by failing to assess the facts correctly, the state appellate court did not conduct a merits review of Respondent's Beck claim. Hogan v. Gibson, 197 F.3d at 1302 n.2. The lack of a merits review by the Oklahoma Court of Criminal Appeals led the Tenth Circuit to conclude correctly that deference should not be afforded to the state appellate court's decision. Consequently, Petitioner's argument to the contrary should be rejected by this Court.

CONCLUSION

Achieving reliability in the determination of a capital murder case is a broad based goal this Court has struggled to fulfill since reinstatement of the death penalty. Beck provides a rule of law that when applied properly assists in bringing reliability to, and ultimately confidence in, the outcome of a capital murder trial. Adopting the arguments of Petitioner would only work to further subvert confidence in an area of law that is already the subject of numerous, and meritorious, attacks. For the foregoing reasons, Respondent, Mr. Kenneth Eugene Hogan, respectfully requests Petitioner's petition for a Writ of Certiorari be denied.

Respectfully submitted,

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